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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 228

EMANUEL L. MAZER AND WILLIAM ENDICTER, DOING BUSINESS AS JUNE LAMP MANUFACTURING COMPANY, PETITIONERS,

vs.

BENJAMIN STEIN AND RENA STEIN, DOING BUSINESS AS REGLOR OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1953.

CERTIORARI GRANTED OCTOBER 12, 1953.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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[fols. A1-13] (Caption omitted)

[fol. 14] (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil Action No. 5879

BENJAMIN STEIN and RENA STEIN, doing business as REGLOR OF CALIFORNIA, Plaintiffs,

vs.

EMANUEL L. MAZER and WILLIAM ENDICTER, doing business as JUNE LAMP MANUFACTURING COMPANY, Defendants. . .

AMENDED COMPLAINT—Filed November 7, 1952

Now come the Plaintiffs and for their Complaint allege as follows:

1. Plaintiffs, Benjamin Stein and Rena Stein, are citizens of the State of California and residents of the County of Los Angeles, State of California. Plaintiffs are partners doing business jointly in Montebello, County of Los Angeles, State of California, under the names and style of Reglor of California.

2. The Defendants, Emanuel L. Mazer and William Endicter, are citizens of the State of Maryland and residents of the City of Baltimore, State of Maryland, Defendants, Emanuel L. Mazer and William Endicter, are partners doing business jointly as June Lamp Manufacturing Company, 1213 S. Sharp Street, Baltimore 30, Maryland.

3. This action arises under the Copyright Laws of the United States. This court has jurisdiction under Title 28, United States Code, Sections 1331 and 1338.

[fol. 15] 4. Plaintiff Rena Stein created and sculptured the meritorious original works of art listed in Paragraph 5 hereof, by the exercise of her skill, labor, judgment and ability. The form, proportions, appearance, decorative features, and every significant portion of said works of art were and are wholly original with Plaintiff Rena Stein and the

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same are copyrightable subject matter under the laws of the United States.

5. Plaintiffs, Benjamin Stein and Rena Stein, doing business as Reglor of California, have complied in all respects with Title 17, United States Code, paragraphs 10, 11, 13, and 19, and with all other laws governing copyright, and have secured the exclusive rights and privileges in and to the copyright of said works of art, and have received from the Register of Copyrights certificates of registration as follows:

Work	Copyright Certificate	Date of Publication of Work
Curved Ballet Dancer—Male	H 1721	July 15, 1949
Curved Ballet Dancer—Female	H 1723	July 15, 1949
Curved Dancers with Textured Clothes—Female Full Figure	H 1717	July 10, 1950
Curved Dancer with Textured Clothes—Male Full Figure	H 1724	July 10, 1950
Egyptian Dancer—Female	CIH 1738	January 25, 1950
Egyptian Dancer—Male	CIH 1737	January 25, 1950

[fol. 16] 6. At all times Plaintiffs have been, and still are, the owners of all rights, title and interest in and to the copyrights of said reproductions of works of art and all rights thereunder.

7. Defendants have infringed Plaintiffs' aforementioned copyrights by publishing, placing on the market and selling reproductions of works of art which are identical in every material respect with and copied from the aforesaid reproductions of works of art. Defendants have so made, placed on the market, and sold these reproductions of works of art within the State of Maryland, without authority of Plaintiffs.

WHEREFORE, Plaintiffs demand:

1. That Defendants, their agents, employees, representatives, officers, dealers, and those acting in privity therewith, be enjoined during the pendency of this action and permanently from infringing said copyright of Plaintiffs in any manner, and from making, selling, offering for sale, marketing or otherwise disposing of any reproductions of works of

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art which are copies of or embody the appearance, style and artistry of Plaintiffs' reproductions of works of art.

2. That Defendants be required to deliver up to be impounded during the pendency of this action all copies and reproductions of the reproductions of the works of art identified herein in their possession or under their control and to deliver up for destruction all infringing copies and all patterns, molds, photographs and other matter used in making, selling, or fostering the sale of such infringing copies.

[fols. 17-20] 3. A judgment and decree holding that Plaintiffs are the owners of the copyrights on the reproductions of works of art identified herein that the said copyrights are good and valid at law; that Defendants have infringed the said copyrights; for an accounting of profits, gains and advantages derived by Defendants from the said infringement and that Plaintiffs have judgment and execution for profits gained for the Defendants and such damages as to the Court shall appear proper.

4. That Plaintiffs be granted such other and further relief as is just.

Benjamin Stein and Rena Stein, doing business as Reglor of California, By Joseph T. Brennan, 2d, Cook, Ruzicka, Veasey, and Gans, First National Bank Bldg., Baltimore, Maryland, Their Attorney. Of Counsel: Bair, Freeman & Molinare, Will Freeman, George E. Frost, 135 South LaSalle Street, Chicago 3, Illinois.

Date: .....

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[fol. 21] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed November 13, 1952

Defendants Emanuel L. Mazer and William Endicter, doing business as June Lamp Manufacturing Company, answering the amended complaint, say:

1

Defendants answering paragraph No. 1 of the amended complaint are not informed save by the amended complaint of the identify of the plaintiffs and leave plaintiffs to their proofs.

2

Defendants admit the allegations of paragraph No. 2.

3

Defendants deny the allegations of paragraph No. 3.

4

Defendants deny the allegations of paragraph No. 4.

5

Defendants deny the allegations of paragraph No. 5.

6

Defendants deny the allegations of paragraph No. 6.

[fol. 22] 7

Defendants deny the allegations of Paragraph No. 7.

8

Further answering the amended complaint, defendants allege as follows:

(a) Plaintiffs' alleged copyrights as alleged were secured for statuettes as "works of art" under the Copyright Laws

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and same are not "works of art" as defined in said Copyright Laws, but are articles of manufacture for a utilitarian purpose protected only by the Patent Laws.

(b) Plaintiffs' alleged copyrights were issued on alleged statuettes as alleged in the amended complaint, whereas plaintiffs have incorporated said designs in an article of manufacture for a utilitarian purpose, namely, an electric table lamp which is not copyrightable subject matter and which was not copyrighted by the Copyright Office, and plaintiffs are fraudulently and improperly using said alleged copyright notices on its said electric table lamps which were not copyrighted and hence plaintiffs come into this Court with unclean hands.

(c) Further answering, defendants allege that objects or products or articles of manufacture designed for a utilitarian purpose, such as a statuette or as electric table lamps, no matter how ornamental, are not protected by the Copyright Laws, but instead are governed by the Patent Laws, namely, Sec. 4929, 4933 of the Revised Statutes (35 U. S. C. 73) which provide as follows:

> "Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than one year [fol. 23] prior to his application thereof, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, the same as in cases of inventions or discoveries covered by section 31 of this title, obtain a patent therefor.
>
> "All the regulations and provisions which apply to obtaining or protecting patents for inventions or discoveries not inconsistent with the provisions of this title, shall apply to patents for designs. (R. S. secs. 4929, 4933; May 9, 1902, ch. 783.32 Stat. 193; Aug. 5, 1939, ch. 450, sec. 1, 33 Stat. 1212.)"

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(d) Further answering, defendants aver that the rules and regulations of the Copyright Office provide that under the classification of "Works of Art" the mechanical or utilitarian aspects of the "works of art" are not protected by the copyright registration. (Secs. 202.8) 17 U. S. C. A. following Sec. 207) provides:

> "Works of art (Class C)—(a) In general. This class includes works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings or sculpture."

(e) Further answering, defendants aver that the plaintiffs have not secured design patents on their alleged "works of art" as is required under the Patent Laws, and hence cannot maintain an action for infringement of a utilitarian object such as an electric table lamp, which is the only product that the defendants are manufacturing and/or selling and which is the product the plaintiffs are likewise manufacturing and selling.

[fol. 24] (f) Further answering, defendants aver that they have not manufactured or sold statuettes embodying the alleged copyrighted "works of art", but that defendants have only manufactured and sold electric table lamps which were not copyrighted by plaintiffs and that same are not subject to the copyright laws and therefore defendants have not infringed plaintiffs' alleged copyrights.

(g) Defendants further allege that the alleged "works of art" set forth in the amended complaint are old and well-known configurations used by others long prior to plaintiffs' alleged creations and pray leave to add same to their answer when discovered.

9

Defendants further allege that the copyright issues involved in the instant litigation have been determined adversely to plaintiffs by the U. S. Court of Appeals for the Seventh Circuit on May 2, 1951 in the case of No. 10347, Benjamin Stein, Rena Stein and H. Kutner, doing business

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as Reglor of California vs. Expert Lamp Company, a corporation reported in 188 Fed. (2d) 611; and that rehearing was denied May 22, 1951; and that certiorari to the Supreme Court was denied, 342 U. S. 829.

(a) Defendants further specifically allege that the plaintiffs in this case in the aforementioned suit sued for infringement of similar alleged copyrighted "works of art" [fol. 25] and that the U. S. District Court, on a motion by defendant to dismiss the amended compla-nt and for summary judgment, sustained defendant's motion and dismissed the complaint without trial. On appeal by plaintiffs, the United States Circuit Court of Appeals for the Seventh Circuit in a unanimous decision on May 2, 1951 affirmed the District Court, sustaining the dismissal of the complaint of the copyright action, holding that the alleged copyrighted "works of art" did not give the plaintiffs a monopoly on articles of manufacture having a utilitarian purpose, nor prevent the reproduction of the designs of said alleged copyrighted "works of art" in electric table lamps, as such designs could not be protected as a monopoly by a mere copyright which is perfunctorily granted by the Copyright Office without examination as to originality or novelty, but could not be protected only by Design patents under the Patent Laws, where an examination is conducted as to originality, novelty and inventiveness. After rehearing was denied the plaintiffs then petitioned the Supreme Court of the United States for a writ of certiorari, and after briefs were filed by both parties the Supreme Court denied certiorari, 342 U. S. 829.

(b) Defendants further answering allege that the alleged "works of art" in said aforementioned litigation were allegedly filed and copyrighted in precisely the same manner as the alleged copyrights in the amended complaint and that said alleged copyrights in said amended complaint are invalid and void for the same reason as set forth in the decision of the United States Circuit Court of Appeals for the Seventh Circuit.

[fol. 26] Wherefore (a) defendants allege that said alleged copyrights do not give plaintiffs a monopoly on articles of manufacture having a utilitarian purpose, and further allege that said alleged copyrights do not give plaintiffs a monop-

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oly so as to prevent the reproduction of the designs of said alleged copyrights in electric table lamps.

(b) Defendants deny that their electric table lamps are an infringement of plaintiffs' alleged copyrighted "works of art" on statuettes, and further that plaintiffs do not have any design patents on same, and that the alleged copyrights do not prevent the reproduction or the manufacture and sale of same.

(c) Defendants allege that plaintiffs' alleged copyrights on said "works of art" do not cover electric table lamps or statuettes and that plaintiffs by placing an alleged copyright notice on their said electric table lamp are guilty of unclean hands and are not entitled to the relief prayed for in the amended complaint.

Wherefore defendants deny that plaintiffs are entitled to any of the relief prayed for in the amended complaint, or to any other relief whatsoever in this cause; defendants deny plaintiffs' rights to obtain an injunction or to any recoveries or damages or profits and pray that the complaint in all of its respect to be dismissed with costs, including reasonable attorneys' fees to the defendants.

Emanuel L. Mazer and William Endicter, d/b/a June Lamp Manufacturing Company, Defendants; by their attorneys, Max Richard Kraus, 33 North LaSalle Street (1122) Chicago 2, Illinois, and Leonard H. Wonneman, 401 Gillet Bldg., Baltimore 2, Maryland.

November 10, 1952.

[fol. 27] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANTS INTERROGATORIES—Filed November 18, 1952

Now come defendants, Emanuel L. Mazer and William Endicter, a partnership d/b/a June Lamp Manufacturing Company, and serves the following interrogatories on plaintiffs Benjamin Stein and Rena Stein, a partnership d/b/a

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Reglor of California, to be answered by defendants according to Rule 33 of the Federal Rules of Civil Procedure:

(1).

(a) With respect to alleged Copyright No. H 1721, state the date that same was first sold as a statuette, and state the date that same was shipped and to whom.

(b) State the date when payment was received for the sale referred to in sub-paragraph (a).

(c) Commencing with the date of first sale as a statuette to the date of institution of this suit, state how many were sold as statuettes.

[fol. 28] (d) Referring to sub-paragraph (c) to whom were such statuettes sold and on what dates.

(e) Attach copies of the invoices or if unavailable of sales records (photostatic or otherwise) of each of such sales referred to in sub-paragraph (d) and give the dates shipments were made and the dates payments were received therefore.

(f) State the date that same was first sold as electric table or floor lamps.

(g) Commencing with the date of first sale as an electric table lamp to the date of institution of this suit, state how many were sold as electric table lamps.

2. With respect to Copyright No. H 1723, answer the interrogatories in sub-paragraphs (a) to (g) inclusive of No. 1, and supply corresponding records, and for purposes of clarity identify such answers as 2(a) to 2(g), inclusive.

3. With respect to Copyright No. H 1717, answer the interrogatories in sub-paragraphs (a) to (g) inclusive of No. 1, and supply corresponding records, and for purposes of clarity identify such answers as 3(a) to 3(g), inclusive.

[fol. 29] 4. With respect to Copyright No. H 1724, answer the interrogatories in sub-paragraphs (a) to (g), inclusive of No. 1, and supply corresponding records, and for the purpose of clarity identify such answers as 4(a) to 4(g), inclusive.

5. With respect to Copyright No. CIH 1737, answer the interrogatories in sub-paragraphs (a) to (g) inclusive of No. 1, and supply corresponding records, and for purposes of clarity identify such answers as 5(a) to 5(g), inclusive.

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6. With respect to Copyright No. CIH 1738, answer the interrogatories in sub-paragraphs (a) to (g), inclusive of No. 1, and supply corresponding records, and for purposes of clarity identify such answers as 6(a) to 6(g), inclusive.

Leonard H. Wonneman, Max R. Kraus, attorneys for Defendants, 401 Gillet Bldg., Baltimore 2, Md.

October 28, 1952.

Acknowledgment of service (omitted in printing).

[fol. 30] (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWERS TO DEFENDANTS' INTERROGATORIES—Filed November 18, 1952.

1. Respecting copyright H-1721, entitled "Curved Ballet Dancer, Male."

(a) All sales have been as statuettes. Some have been with lamp parts added. Others have been without lamp parts. The first sale with lamp parts took place on July 15, 1949. The first sale without lamp parts took place just prior to August 10, 1950. The sale without lamp parts was to El Futuro, 1283 Sixth Avenue, New York, N. Y. Shipment took place on August 10, 1950.

(b) Payment was received on the first sale of the statuette with lamp parts shortly after July 15, 1949. Payment was received on the first sale of the statuette without lamp parts on August 28, 1950.

(c) A total of approximately 960 sales have been made of this number. Of these two have been sold without lamp parts.

[fol. 31] (d) The sales of the statuettes with lamp parts have been to customers throughout the United States and have taken place during the entire time from

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July 15, 1949, to the date of institution of this suit. The sales of the statuettes without lamp parts were made to El Futuro just prior to August 10, 1950, and just prior to October 6, 1950.

(e) The invoices of sales of the statuettes with lamp parts are so numerous that Plaintiffs cannot attach the same. The invoices of the sales without lamp parts are attached.

(f) See answer (a), above.

(g) See answer (c), above.

2. Respecting copyright H-1723 entitled "Curved Ballet Dancer, Female."

(a) All sales have been as statuettes. Some have been with lamp parts added. Others have been without lamp parts. The first with lamp parts took place on July 15, 1949. The first sale without lamp parts took place just prior to August 10, 1950. The sale without lamp parts was to El Futuro, 1283 Sixth Avenue, New York, N. Y. Shipment took place on August 10, 1950.

(b) Payment was received on the first sale of the statuette with lamp parts shortly after July 15, 1949. Payment was received on the first sale of the statuettes without lamp parts on August 28, 1950.

[fol. 32] (c) A total of approximately 1100 sales have been made of this number. Of these two have been sold without lamp parts.

(d) The sales of the statuettes with lamp parts have been to customers throughout the United States and have taken place during the entire time from July 15, 1949, to the date of institution of this suit. The sales of the statuettes without lamp parts were made to El Futuro just prior to August 10, 1950, and just prior to October 6, 1950.

(e) The invoices of sales of the statuettes with lamp parts are so numerous that Plaintiffs cannot attach the same. The invoices of the sales without lamp parts are attached.

(f) See answer (a), above.

(g) See answer (c), above.

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3. Respecting copyright H-1717, entitled "Curved Dancers with Textured Clothes, Female Full Figure."

(a) All sales have been as statuettes. Some have been with lamp parts added. Others have been without lamp parts. The first sale with lamp parts took place on July 10, 1950. The first sale without lamp parts took place just prior to November 22, 1950. The sale without lamp parts was to Cook's Modern Homes of Dallas, Texas. Shipment took place on November 22, 1950.

(b) Payment was received on the first sale of the statuette with lamp parts shortly after July 10, 1950. Payment was received on the first sale of the statuette without lamp parts on December 8, 1950.

[fol. 33] (c) A total of approximately 2,050 sales have been made of this number. Of these, four have been sold without lamp parts.

(d) The sales of the statuettes with lamp parts have been to customers throughout the United States and have taken place during the entire time from July 10, 1950, to the date of institution of this suit. The sales of the statuettes without lamp parts were made to Cook's Modern Home, just prior to November 22, 1950; Klipstein, of North Hollywood, California, just prior to November 22, 1950; the Malikini of Chicago, Illinois, just prior to December 11, 1950, and May 18, 1951.

(e) The invoices of sales of the statuettes with lamp parts are so numerous that Plaintiffs cannot attach the same. The invoices on the sales without lamp parts are attached.

(f) See answer (a), above.

(g) See answer (c), above.

4. Respecting copyright H-1724 entitled "Curved Dancer with Textured Clothes, Male Full Figure."

(a) All sales have been as statuettes. Some have been with lamp parts added. Others have been without lamp parts. The first sale with lamp parts took place on July 10, 1950. The first sale without lamp parts took place just prior to November 22, 1950. The sales without lamp parts was to Klipstein of North Hollywood, California. Shipment took place on November 22, 1950.

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[fol. 34] (b) Payment was received on the first sale of the statuette with lamp parts shortly after July 10, 1950. The first sale of the statuette without lamp parts was on a no-charge basis.

(c) A total of approximately 1830 sales have been made of this number. Of these, one was sold without lamp parts.

(d) The sales of the statuettes with lamp parts have been to customers throughout the United States and have taken place during the entire time from July 10, 1950, to the date of institution of this suit. The sales of the statuettes without lamp parts was made to Klipstein just prior to November 22, 1950.

(e) The invoices of sales of the statuettes with lamp parts are so numerous that Plaintiffs cannot attach the same. The invoice on the sale without lamp parts is attached.

(f) See answer (a), above.

(g) See answer (c), above.

5. Respecting copyright CIH 1737 entitled "Egyptian Dancer, Male."

(a) All sales have been as statuettes with lamp parts added. The first sale took place on January 25, 1950.

(b) Payment was received on the above first sale shortly after January 25, 1950.

(c) A total of approximately 750 sales have been made of this number. All have been with lamp parts added.

[fol. 35] (d) The sales of the statuettes with lamp parts have been to customers throughout the United States and have taken place during the entire time from January 25, 1950, to the date of institution of this suit.

(e) The invoices of sales of the statuettes with lamp parts are so numerous that Plaintiffs cannot attach the same.

(f) See answer (a), above.

(g) See answer (c), above.

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6. Respecting copyright CIH 1738, entitled "Egyptian Dancer, Female."

(a) All sales have been as statuettes. Some have been with lamp parts added. Others have been without lamp parts. The first sale with lamp parts took place on January 25, 1950. The first sale without lamp parts took place just prior to November 24, 1950. The sale without lamp parts was to El Futuro, 1283—6th Avenue, New York, New York. Shipment took place on November 24, 1950.

(b) Payment was received on the first sale of the statuette with lamp-parts shortly after January 25, 1950. Payment for the first sale of the statuette without lamp parts was on December 7, 1950.

(c) A total of approximately 760 sales of this number have been made. Of these one was sold without lamp parts.

[fols. 36-46] (d) The sales of the statuettes with lamp parts have been to customers throughout the United States and have taken place during the entire time from January 25, 1950, to the date of institution of this suit. The sale of the statuettes without lamp parts was made to El Futuro just prior to November 24, 1950.

(e) The invoices of the sales of the statuettes with lamp parts are so numerous that Plaintiffs cannot attach the same. The invoice on the sales without lamp parts is attached.

(f) See answer (a), above.

(g) See answer (c), above.

Benjamin Stein and Rena Stein, doing business as Reglor of California, by Joseph T. Brennan, 2d., Attorneys for Plaintiffs.

November 12, 1952.

Acknowledgment of Service (omitted in printing).

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[fol. 46a] PLAINTIFF'S EXHIBIT No. 14

Case No. 5879 Civil

Admitted in Evidence Nov. 20, 1952

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MARYLAND

Civil Action No. 5879

BENJAMIN STEIN and RENA STEIN, doing business as Reglor of California, Plaintiffs

vs.

EMANUEL L. MAZER and WILLIAM ENDICTER, doing business as June Lamp Manufacturing Company, Defendants

STIPULATION

It is hereby stipulated by and between the parties hereto that the testimony of Mr. Benjamin Stein in the case of *Stein et al vs. Benaderet, et al,* No. 11,119, United States District Court for the Eastern District of Michigan may be used in the above case with the same force and effect as if taken on deposition in the above case.

It is further agreed that Mr. Stein, if called to testify in the above case and interrogated by counsel for Defendants, would testify as follows:

Q. In your answers to Defendant's interrogatories you state that the statuettes have been sold with lamp parts added. Does that term, wherever used, mean electric table lamps with wiring, electric sockets, and lamp shades?

A. Yes.

It is further stipulated that each of Plaintiffs' exhibits 1A, 2A, 3A, 4A, 5A and 6A is a specimen submitted to the [fol. 46b] Copyright Office and the copyright certificates, Plaintiffs' exhibits 1, 2, 3, 4, 5 and 6, respectively were received upon the basis of specimens submitted to the

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Copyright Office and in every physical respect like Plaintiffs' exhibits 1A, 2A, 3A, 4A, 5A and 6A.

Joseph T. Brennan, 2d., Cook, Ruzicka, Veazey & Gans, 1904 First National Bank Bldg., Baltimore 2, Maryland; George E. Frost, Counsel for Plaintiffs. Max R. Kraus, Counsel for Defendant.

[fol. 47a] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

EXCERPTS FROM TRANSCRIPT OF TESTIMONY—Filed January 5, 1953

WILLIAM ENDICTER, was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name for the record.

The Witness: William Endicter.

Direct examination.

By Mr. Frost:

Q. Where do you live?
A. In Baltimore.
Q. And your occupation?
A. Lamp manufacturer.
Q. Under what name do you do business?
A. June Lamp Manufacturing Company.
Q. Is that a partnership?
A. That is right.
Q. Who are the partners?
A. Myself and Emanuel L. Mazer.
Q. And you are the defendants in this cause?
A. That is right.
Q. How long has the partnership been in business?
A. Approximately four years.

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Q. Prior to that time you were in the lamp manufacturing business?
A. That is right.

* * * * * * *

By Mr. Frost:

Q. Mr. Endicter, do you manufacture the exhibits here identified as Plaintiffs' Exhibits 1-B to 6-B inclusive?
A. That is right.
Q. Now, Mr. Endicter, would you call those California style numbers?
A. Yes, I have.

* * * * * * *

Cross-examination.

By Mr. Kraus:

Q. With respect to these units, can you tell me what your profit was per lamp?
A. Eighty-five cents per unit net profit.
Q. Per lamp?
A. Yes.
Q. Did you sell any statuettes apart from lamps?
A. No, I did not.
Q. Every one you sold was wired electrically?
A. That is right.
Q. And had an electric socket?
A. Yes.
Q. And had a shade thereon?
A. That is right.
Q. And you sold a total of 120 units all together?
A. 102.

* * * * * * *

The Court: Was this wholesale?
The Witness: That is right, Your Honor.
The Court: What was the wholesale unit price?
The Witness: The wholesale price, $10.95 each complete with shade.

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[fol. 47b] BENJAMIN STEIN, a witness on behalf of the Plaintiffs, having been first duly sworn by the Clerk, testified as follows: *

Direct examination.

By Mr. Frost:

Q. Will you state your full name, please?
A. Benjamin Stein.
Q. Where do you live?
A. 732 South Maple Avenue, Montebello, California.
Q. What is your business?
A. I am a lamp manufacturer.
Q. And under what name do you do business?
A. Reglor of California?
Q. Is Reglor a partnership?
A. It is.
Q. Who are the partners?
A. My wife and myself.
Q. And you and your wife are the plaintiffs in this suit?
A. We are.
Q. Just for the purposes of the record, Mr. Stein, will you give us your wife's name?
A. Rena E. Stein.

* * * * * * *

Q. Now, Mr. Stein, can you tell us very briefly the history of Reglor of California?

A. We started our business in the latter part of 1947, my wife and myself. There were just the two of us engaged in the business for approximately two years, and during that time, my wife kept designing new pieces, and as we added to the line and our sales increased, why, we developed and the business became a national organization.

Q. Mr. Stein, do your numbers differ from the numbers on the market at the time you began business?

A. Yes, they did.

---

* Introduced by Plaintiffs from the case of Stein v. Bernaderet et al., (No. 11,119, Eastern District of Michigan) per stipulation, Plaintiffs' Exhibit 14.

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Q. And in what respect did they differ?

A. The pieces in existence at that time were very static, straight they did not have the fluidity of movement that Mrs. Stein brought into her sculpture and designing.

[fol. 47c] Q. Mr. Stein, I hand you a document identified as Plaintiff's Exhibit 25 * for identification, and ask you if you will please identify it?

A. This is an illustrated price list that we brought out approximately two years ago.

Q. I bring your attention to the pictures on Exhibit 25.* Can you identify them?

A. Yes; those are pieces that are in the line at the present time.

Q. Where did those numbers originate?

A. These are all original designs that were made and sculptured by Mrs. Stein.

Q. And Mrs. Stein is an artist?

A. She is definitely an artist.

Q. And she sculptured——

A. (Interposing) Every piece.

Q. (Continuing)—every piece?

A. Absolutely.

Q. Do you have any company policy in that respect?

A. Very definitely. The field at the time we went into it was such that we had no prior experience in this particular business. Consequently, we stress one thing and that was originality, freshness, in this particular field, and we have always strived to be original and stick only to innovations and fine sculptures. Anyone can sell a pipe and a shade. We are selling the design.

* * * * * * *

The Court: Did you go into the lamp business right at the start or in the statuette business?

A. Your Honor, we sold statuettes at first.

The Court: For how long?

A. A very short while. I don't think it was over three months, your Honor.

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* Plaintiffs' Exhibit 12 in the present cause (R. 58-9).

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The Court: And did somebody take one of your statuettes and make a lamp out of it?

A. They did.

[fol. 47d] The Court: Then showed it to you, and you thought it was a good idea to go into the lamp business?

A. No, sir. We made statuettes for a lamp manufacturer who purchased our entire output, which at that time was three hundred a week. All right. He said he would take three hundred for forty production weeks, of just statuettes.

The Court: Did you know that they were going to be used for lamps?

A. Yes.

The Court: Going to be used for lamps?

A. Yes, your Honor. Well, at the end——

The Court: (Interposing) That is after three months?

A. Well, we sold statuettes on our own prior to that.

The Court: As statues?

A. That is right.

The Court: But not as lamps?

A. No.

The Court: That is what I am trying to find out, how you got so that you were using these statuettes of yours as lamps.

A. It was the design that demanded it.

The Court: I know. But what I am trying to find out is, you started out with the statuette business?

A. Yes.

The Court: Somebody took one of your statuettes and made a lamp out of it, didn't they?

A. That is right, your Honor.

The Court: Who was that?

A. Lighthouse Lamp and Shade Company.

The Court: Not connected with you?

A. No. We sold them our bases.

Q. And just what is your procedure with reference to copyrighting your numbers?

A. We submit two specimens to the Copyright Office in Washington, D. C. We submit these without any metal parts or any preparation for lamp making. They are submitted as statues only, and works of art, through the Copy-

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right Office. It is on this basis that we then receive from the Congressional Library, or the Copyright Office, the Copyright for the statue that we forwarded in application form under separate cover.

[fol. 47e] Q. Mr. Stein, do you identify Plaintiff's Exhibit 4?

A. I do.

Q. And what is it?

A. That is one of the two specimens we sent to the Copyright Office.

The Court: When this goes to the Copyright Office, they have no idea what it might be used for, that is, except as they might anticipate? It comes to them as a statue?

A. That is right.

The Court: Or a statuette?

A. That is right.

* * * * * * *

By Mr. Frost:

Q. Now, Mr. Stein, will you just tell us how Plaintiff's Exhibit 1 was created?

A. Mrs. Stein started with perhaps six to ten rough pencil sketches of a subject she has been considering. She then makes a composite drawing of what she feels to be her best work of a group of sketches that she has completed. At that time, she then starts with a mass of clay for her armature. She adds the clay to her armature and follows along the general lines of her sketch. Now, frequently and quite often as she progresses with the design she will deviate when she feels deviation from the original sketch will enhance the beauty of her work. Then, of course, we have the completed sculptured clay model.

Q. How is that produced, Mr. Stein?

A. The clay model?

Q. Yes?

A. Naturally, that is a process of her sculpturing. The next stage, of course, we have to obtain from the clay a transfer into a harder substance than can then be made into a rubber mold, and that is done through a process that is called waste mold.

* * * * * * *

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Q. And in the center portion of Exhibit 26-A, Plaintiff's Exhibit 26-A, you note a legend that has been encircled in red reads:

> [fol. 47f] "Reglor lamps are available singly or in matched male and female pairs . . . all bases are also available as statues only."

What does that signify to you, Mr. Stein?

A. That means exactly what it states, in that we make available to anyone that desires a statue, a statue only.

Q. Now, tell me, Mr. Stein, do you have a company policy with reference to that?

A. Very definitely. Ever since we have been in business, we have always offered statues to the trade who were desirous of selling statues.

Q. And with reference to the legend on the back side of Plaintiff's Exhibit 25,* that refers to the same policy?

A. It does.

Q. Now, Mr. Stein, have you actually sold any of these numbers as statuettes only?

A. Yes, sir; we have.

Q. Can you give us a rough idea of the number of those sales?

* * * * * * *

A. I would say several hundred statuettes have been sold.

Q. And how did you determine that number, Mr. Stein?

A. I checked the figures for 1952. I called my office in Los Angeles and had them read off to me the name of the account, the statues that were sold, and the date they were shipped, and I have that in here, and that totals, for 1952, to about forty-one statuettes.

Q. And then you took that data and multiplied it by the number of months you have been selling to get several hundred?

A. That is right, Mr. Frost.

* * * * * * *

---

* Plaintiff's Exhibit 12 in the present cause.

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Q. Mr. Stein, do you know of any occasion where Reglor of California has refused to sell a statuette as distinguished from a complete lamp.

A. Absolutely no.

* * * * * * *

[fol. 47g] Cross Examination by Mr. Kraus.

Q. Mr. Stein, were you the plaintiff in the case in Chicago entitled Benjamin Stein, Rena Stein and Henry Kutner doing business as Reglor of California against Expert Lamp Company?

A. Yes.

Q. That case was tried and went from the District Court, and also a petition for certiorari was filed in the Supreme Court of the United States and was denied. Is that correct?

A. I believe that is right.

Q. Now, in that case, the figures involved were Balinese figures, were they not?

A. That is right.

Q. Male and female. Now, how did you copyright those statuettes?

A. Those statuettes were sent to the Copyright Office as statuettes, but, through a misunderstanding between myself and Mr. Frost, in our brief he stated they had pipe protruding, which they did not, and the whole case hinged on that.

* * * * * * *

Q. Now, the copyright you forwarded to the copyright office was an ordinary statuette, was it not, in that other case, the two Balinese figures, without stubs; is that correct?

A. That is right.

Q. Now, I show you the transcript of record in the Supreme Court of the United States and ask you to look at page 52-A and ask you if that is not the way they were copyrighted there, the statue?

A. That is right.

Q. Now, there are no stubs on that?

A. No stubs protruding.

Q. And there are no stubs on any of the statuettes you copyrighted here; is that correct?

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A. That is correct.

Q. In other words, the figures in that case, in the Expert case, were copyrighted in the identical manner that they were copyrighted here; is that correct?

A. And the same way they were in the California case. [fol. 47h] The Court: All of these lamps, as I understand it are copyrighted as statues?

A. That is right.

Mr. Kraus: Yes. What I am trying to bring out is that the Expert case statues were copyrighted in the identical manner as they were. There is no distinction between the two cases.

The Court: Wasn't there in that case—didn't the court in that case refer to the fact that they were copyrighted as lamps?

Mr. Kraus: Yes. I will bring that out on my—in the Court of Appeals, the Court of Appeals didn't make that distinction.

The Court: Was it brought to the attention of the Court of Appeals?

Mr. Kraus: Absolutely. On a petition for reconsideration.

The Court: I would think it would have been. All right.

Mr. Kraus: I will produce the record in that case.

The Court: Have you got the briefs in that case?

Mr. Kraus: I have my brief. I have here a——

The Court: (Interposing) Did you appear in that case?

Mr. Kraus: Yes. Mr. Frost and I. This is the same case. We are both familiar with it. I appeared for the defendant and Mr. Frost appeared for the same plaintiff in that case.

The Court: You take the position, Mr. Frost, that the facts as they went to the court in that case are not the same as the situation in this case?

Mr. Frost: Yes, your Honor.

The Court: All right.

Q. (By Mr. Kraus) But you admit, do you not, that the figures that were copyrighted in the Expert case in Chicago were copyrighted in the identical manner that the figures are here copyrighted; is that correct?

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A. That is correct.

* * * * * * *

[fol. 47i] Deposition of Testimony of Mr. ARTHUR FISHER, Register of Copyrights:

Q. Will you state your name please?
A. Arthur Fisher.
Q. What is your position?
A. Register of Copyrights of the United States.
Q. What are your duties?
A. My principal duties are to administer the Copyright Law which is Title 17 of the United States Code. My duties include the registration of claims to copyrights, the making of rules and regulations, the recordation of assignments of copyrights, publication of catalogue of copyright entries, and those other statutory duties provided by said Title 17.
Q. How long have you been engaged in this work?
[fol. 47j] A. I have been in the copyright office for about five and one-half years, originally an Associate Register for about four years. I was Acting Register for about a year, and I have been Register of Copyrights for something like nine months.
Q. Can you state what the practice of the copyright office is with respect to Section 5 (g) of the Copyright Code?
A. The practice of the copyright office is to register claims for copyrights in any work which in our opinion is a work of art, even though such work has a mechanical or utilitarian aspect. Such works must be the product of artistic craftsmanship and may include works of art such as those used for bookends, ash trays, piggy banks and so forth.
Q. When was this practice introduced in the Copyright Office?
A. I do not know when the practice was first instituted, but it was followed at the time I first came to the Copyright office in 1946, at which time the practice was well established.
Q. Is the practice of the copyright office that you have just referred to covered by regulations?
A. It only has general rules and regulations. We also

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have a particular regulation which is Regulation 202.8 dealing with the registration of works of art.

Mr. Frost: May we have this document marked as Plaintiffs' Exhibit No. 7 for identification please?

(Regulations of Copyright Office were marked for identification, Plaintiffs' Exhibit No. 7)

By Mr. Frost:

Q. I hand you a document marked Plaintiffs' Exhibit No. 7 for identification and ask if you can tell us what it is.

A. This document is the regulation of the Copyright Office included in the Code of Federal Regulations, Title 37-Patents, Trade-marks and Copyrights, Chapter II-Copyright Office, Library of Congress. They were issued December 22, 1948.

[fol. 47k] This embodies, I believe, the present regulations of the office with a minor modification which does not deal with the subject of registration of works of art.

Q. Does Plaintiffs' Exhibit No. 7 include Section 202.8 of the regulations?

A. It does include regulation 202.8.

Q. Will you please encircle regulation 202.8 on Plaintiffs' Exhibit No. 7?

Mr. Frost: Let the record show that the witness has encircled Section 202.8 of the regulations as requested.

Mr. Frost:

Q. I notice that Section 202.8 of the regulations includes this language, and I quote:

> "* * * works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned, * * *"

Can you tell us in some detail the meaning of that language?

A. In applying the words to which you refer to applications for registration of works of art, it is the practice of the Copyright Office to make a determination as to whether the work submitted is or is not a work of art. The

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phrase "insofar as their form but not their mechanical or utilitarian aspects are concerned" is interpreted by the office and by our examiners to permit them to deal only with the question of whether the work is a work of artistic craftsmanship, and they consider, it is our practice to consider as immaterial whether the work may also have a mechanical or utilitarian aspect.

We do not consider that we are registering or dealing with that mechanical or utilitarian aspect but are only dealing with the artistic aspect of the work which is submitted under an application for a work of art.

I might give some example of that. For example if this Daumier etching, engraving that I have on the wall were framed and were submitted to us with some indication that it was to be used as a modern tea tray with a stand, our office would deal only with the artistic aspects of the work and would not be concerned with the fact that it also had a utilitarian use or purpose.

[fol. 47-1] Again, we frequently will receive applications for the registration of paintings on plates, for example. We register the painting on the plate but we are not concerned with the fact that the material upon which the painting is made may be intended as an article of utility for the handling of food. In other words the practice of the office with respect to this phrase about which I am asked is not to undertake to register or deal with the mechanical or utilitarian aspects, but exclusively to determine whether the work that is submitted to us is a work of art and we disregard the question of whether it has in addition a mechanical or utilitarian function.

Q. Mr. Fisher, is there any history of the Copyright Law drawing any distinctions between fine arts and other art?

A. It is my understanding that before the substantial modifications of the law in 1909 the Statute contained a reference to works of art as works of fine art.

When consideration was being given to the Bill that led to the Act of 1909, the then librarian of Congress, Mr. Putnam, testified on this aspect of the law, his testimony appearing at the hearings of the Committee of Patents of the House of Representatives of June 6, 1906 at, I believe, page eleven. The librarian testified:

> "* * * the term 'works of art' is deliberately intended as a broader specification than 'works of the fine arts' in the present statute with the idea that there is subject-matter (for instance, of applied design, not

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yet within the province of design patents), which may properly be entitled to protection under the Copyright Law."

It is my understanding that following this modification of the Statute eliminating the reference to fine arts, the practice developed in the office of registering works of art which were determined to be works of art even if they were not works of fine art in the strict sense and even if they had a utilitarian aspect.

By the time I came to the office that practice seemed to be well established and the rule to which I have already [fol. 47-m] made reference which is in the present regulations of the Copyright Office, 202.8, was adopted to express the then existing practice of the office and that practice has continued, to my knowledge, right down to the present time.

Q. Mr. Fisher, as Register of Copyright Rights, have you made a study of the history of copyright laws?

A. Well, I don't pose as a leading historian of copyright laws but I have had occasion to look at the history of the laws of various countries including the United States in the development of copyright laws.

Q. Have you studied the hearings from which you have quoted?

A. I have had occasion to read some of the testimony which was submitted in connection with the adoption of the Act of 1909 which is still our basic statute with minor modifications.

Q. And you take that into consideration in applying the copyright law in the Copyright Office?

A. Yes, I would consider the statement of the Librarian of Congress, of which institution the Copyright Office is a part, had some bearing on the procedures and practices which ought to be followed by my office so long as the Law of 1909 is still the basic law on the books.

Mr. Frost: I have an object I would like you to mark as Plaintiffs' Exhibit No. 8 for identification.

(Whereupon a piece of statuary was marked for identification as Plaintiffs' Exhibit No. 8 and retained in the office of the Register of Copyrights.)

By Mr. Frost:

Q. I hand you Plaintiffs' Exhibit No. 8 for identification and ask you if you can tell us what that is?

A. Well, I believe this is a piece of statuary, artistic

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in character, an artistic figure that was submitted to the Copyright Office for registration.

It seems to bear a stamp of our office and the number CIH 1723.

* * * * * * *

Q. Would you register Plaintiffs' Exhibit No. 8 if you knew that it was to be used as a lamp base?

[fol. 47-n] A. As I have said before our problem is to determine whether the work submitted is a work of art. We make that determination and registration even though we may have reason to believe that the work of art may happen to be used for some other purpose.

Q. Have you any written record of the determination?

A. Yes, the very fact that there is a stamp that it is accepted for registration means that there was a determination that this, in the determination of the Copyright Office, is a work of art.

* * * * * * *

Q. Referring to regulation 202.8 of the Copyright Office, the wording of that section is as follows:

> "This class includes works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned——"

Keeping that in mind, Mr. Fisher, when you take a work of art and register it and give the party who has registered that work of art a certificate indicating such registration, you just give them the rights insofar as that particular figure is concerned insofar as its artistic craftsmanship is concerned. Am I correct in that statement?

A. Our determination I believe is that that work is a work of art. The question arises as to what is a work of art in any particular case. I believe that is a question of fact in each case. We try to make a determination as to whether there has been artistic craftsmanship expended in the production of this work of art, quite apart from the utilitarian or mechanical aspects of the work.

Q. In other words, from your answer, it is my understanding that by issuing the certificate of registration you give such applicant no rights as far as mechanical or utilitarian purpose is concerned?

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A. I believe that is correct. We are undertaking to register the artistic aspect of the product and not its utilitarian or mechanical purpose.

To give another example in another field, in the receiving of literary work we will register the literary property. We are not concerned with the fact that the literary work may [fol. 47-o] be a heavy dictionary that might be used for some utilitarian purpose, such as a high chair for a child at dinner, or a doorstop, or for some other practical value as an object. We will register the literary aspects of that work, the intangible literary aspects, and we feel that in the case of works of art we are again registering and recognizing the artistic aspects of the work, quite apart from what other utilitarian uses might be made of that work.

Q. Is the practice of the Copyright Office the same with respect to Class H registration as it is with respect to Class G?

A. The principles the Copyright Office follows are the same. It will be noted that Class G is the first and basic classification dealing with works of art, and also models or designs for works of art. Class H is the class dealing with reproductions of works of art.

The policies and practices followed by the office in determining whether the work is a work of art are the same in both instances. It is immaterial whether the work is an original work of art or a model or a reproduction of a work of art. It is a matter of historical accident that these different types of artistic work are not included within the same classification, and as a matter of fact, applicants freely select between the two classes and I recall of no cases where an exception has been taken by this office because of any question as to whether the particular work was appropriately classified under G or H.

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PLAINTIFF'S EXHIBIT NO. "1"

PLAIN... - ...

CASE NO. 5879 Civil

ADMITTED IN EVIDENCE

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A REPRODUCTION OF A WORK OF ART

REGISTRATION NO. ©cH 1723

CLASS H

REPRODUCTION OF A WORK OF ART **FORM H**

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Sam B. Warner
Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

Reglor Of California

732 So. Maple Ave., Montebello, Calif.

2. TITLE OF WORK CURVED BALLET DANCER - FEMALE

3. AUTHORS (The word "Author" includes an employer in the case of works made for hire). Full name (including middle name) and pseudonym (if any):

(a) Author of the reproduction:

NAME Rena (First) Evelyn (Middle) Stein (Last) CITIZENSHIP U.S.A. (Give name of country)

DOMICILE 732 So. Maple Ave., Montebello, Calif. (Address)

(b) Author of original work which has been reproduced:

NAME Rena (First) Evelyn (Middle) Stein (Last)

4. PUBLISHER AND DATE:

(a) Published by Reglor of California (Name) at Montebello, Calif. (Place)

(b) Date first placed on sale, sold, or publicly distributed July 15, 1949 (Month, day, and year)

5. IF PRODUCED OUTSIDE THE UNITED STATES by lithographic or photoengraving process, state where ..... (Country)

6. SEND CERTIFICATE, REFUND (IF ANY), AND OTHER COMMUNICATIONS TO:

NAME Reglor Of California

ADDRESS 732 So. Maple Ave. (Number and Street)

Montebello, Calif. (City) (Zone) (State)

DATES OF RECEIPT IN COPYRIGHT OFFICE	
APPLICATION	Sep. 19, 1950
ONE COPY	
TWO COPIES	Oct. 2, 1950

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INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A REPRODUCTION OF A WORK OF ART

Registration may be secured for a reproduction of a work of art after it has been published with notice of copyright, which may consist of the word "Copyright" or the abbreviation "Copr." or the symbol ©, accompanied in either case by the name of the copyright proprietor. The symbol © may be accompanied merely by the initials, monogram, mark, or symbol of the copyright proprietor, provided that on some accessible portion of the copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear.

The "date of publication" in the case of a work of which copies are reproduced for sale or public distribution is defined in the Copyright Act as "the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority". The Act provides that promptly after such publication with notice there shall be deposited in the Copyright Office two complete copies of the best edition thereof then published, which should be accompanied by an application on Form H and statutory fee of $4 for registration and certificate. For the purpose of identification, each copy deposited in the Copyright Office should bear a title which should correspond with the title given in the application for registration.

The term "Reproduction of a Work of Art," refers to a reproduction of an existing work presented in a different medium, such as an engraving of a painting. In filling out the application for registration, the citizenship of the reproducer should be given in space 3, rather than that of the original artist. The Act provides that the word "author" shall include an employer in the case of works made for hire.

The first term of copyright is 28 years, which is computed in the case of a work published in the first instance from the date of publication. In the twenty-eighth year a renewal application (Form R furnished upon request) may be made to secure a second term of 28 years.

★ ★ ★ ★

If you desire information or application forms (supplied free) for any class of work listed below, please advise which:

CLASS A—Books published in the United States (application Form A).
Books first published in a foreign country (application Form A Foreign).

CLASS B—Periodicals (application Form B).
Contributions to periodicals (application Form B5).

CLASS C—Lectures, sermons, addresses, prepared for oral delivery (application Form C).

CLASS D—Dramatic or dramatico-musical compositions (application Form D).

CLASS E—Musical compositions (application Form E).

CLASS F—Maps (application Form F).

CLASS G—Works of art; models or designs for works of art (application Form G).

CLASS H—Reproductions of a work of art (application Form H).

CLASS I—Drawings or plastic works of a scientific or technical character (application Form I).

CLASS J—Photographs (application Form J).

CLASS K—Prints and pictorial illustrations (application Form K).
Prints or labels used for articles of merchandise (application Form KK).

CLASS L—Motion-picture photoplays (application Form L).

CLASS M—Motion pictures other than photoplays (application Form M).

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PLAINTIFF'S EXHIBIT NO. "2"

PLAINTIFF'S

CASE NO. 5879 Civil

ADMITTED IN EVIDENCE NOV 20 1952

REGISTRATION NO. ©cH 1721 CLASS H

REPRODUCTION OF A WORK OF ART FORM H

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A REPRODUCTION OF A WORK OF ART

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Sam B. Warner
Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):
Reglor Of California
732 So. Maple Ave., Montebello, Calif.

2. TITLE OF WORK CURVED BALLET DANCER - MALE

3. AUTHORS (The word "Author" includes an employer in the case of works made for hire). Full name (including middle name) and pseudonym (if any):
(a) Author of the reproduction:
NAME Rena (First) Evelyn (Middle) Stein (Last) CITIZENSHIP U.S.A. (Give name of country)
DOMICILE 732 So. Maple Ave., Montebello, Calif. (Address)
(b) Author of original work which has been reproduced:
NAME Rena (First) Evelyn (Middle) Stein (Last)

4. PUBLISHER AND DATE:
(a) Published by Reglor of California (Name) at Montebello, Calif. (Place)
(b) Date first placed on sale, sold, or publicly distributed July 15, 1949 (Month, Day, Year)

5. IF PRODUCED OUTSIDE THE UNITED STATES by lithographic or photoengraving process, state where (Country)

6. SEND CERTIFICATE, REFUND (IF ANY), AND OTHER COMMUNICATIONS TO:
NAME Reglor Of California
ADDRESS 732 So. Maple Ave. (Number and Street)
Montebello, Calif. (City) (Zone) (State)

DATES OF RECEIPT IN COPYRIGHT OFFICE	
APPLICATION	Sep. 19, 1950
ONE COPY	
TWO COPIES	Oct. 2, 1950

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PLAINTIFF'S EXHIBIT NO. "3"

Additional Certificate (17 U.S.C. 215)

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A REPRODUCTION OF A WORK OF ART

REGISTRATION NO. H 1717 CLASS H

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Register of Copyrights
United States of America

CASE NO. 5879 Civil.

ADMITTED IN EVIDENCE NOV 20 1952

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

Reglor of California

732 South Maple Avenue, Montebello, Calif.

2. TITLE OF WORK CURVED DANCERS WITH TEXTURED CLOTHES - FEMALE FULL FIGURE

3. AUTHORS (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

(a) Author of the reproduction:

Name Rena Evelyn Stein (First) (Middle) (Last) Citizenship U.S.A. (Give name of country)

Domicile 732 South Maple Avenue, Montebello, Calif. (Address)

(b) Author of original work which has been reproduced:

Name Rena Evelyn Stein (First) (Middle) (Last)

4. PUBLISHER AND DATE:

(a) Published by Reglor of California (Name) at Montebello, Calif. (Place)

(b) Date first placed on sale, sold, or publicly distributed July 10, 1950 (Month, day, and year)

5. IF PRODUCED OUTSIDE OF THE UNITED STATES by lithographic or photoengraving process (see Section 16 of Title 17 of the United States Code)

state where ..... (Country)

DATES OF RECEIPT IN COPYRIGHT OFFICE	
APPLICATION	Sept 18, 1950
ONE COPY	
TWO COPIES	Oct 2, 1950
FEE	$4. 63464 Sept 18, 1950

16—63905-1

6. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 7.)

Name Reglor of California

Address 732 South Maple Avenue (Number and street)

Montebello, Calif. (City) (Zone) (State)

7. Name ..... Address .....

47s=47t

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35

PLAINTIFF'S EXHIBIT NO. "4"

Additional Certificate (17 U.S.C. 215)

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A REPRODUCTION OF A WORK OF ART

REGISTRATION NO. H 1724 CLASS H

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

Reglor of California

732 South Maple Avenue, Montebello, Calif.

2. TITLE OF WORK CURVED DANCER WITH TEXTURED CLOTHES - MALE FULL FIGURE

3. AUTHORS (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

(a) Author of the reproduction:

Name Rena Evelyn Stein (First) (Middle) (Last) Citizenship U.S.A. (Give name of country)

Domicile 732 South Maple Avenue, Montebello, Calif. (Address)

(b) Author of original work which has been reproduced:

Name Rena Evelyn Stein (First) (Middle) (Last)

4. PUBLISHER AND DATE:

(a) Published by Reglor of California (Name) at Montebello, Calif. (Place)

(b) Date first placed on sale, sold, or publicly distributed July 10, 1950 (Month, day, and year)

5. IF PRODUCED OUTSIDE OF THE UNITED STATES by lithographic or photoengraving process (see Section 16 of Title 17 of the United States Code) state where ____ (Country)

6. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 7.)

Name Reglor of California

Address 732 South Maple Avenue (Number and street)

Montebello, Calif. (City) (Zone) (State)

7. Name ____ Address ____

DATES OF RECEIPT IN COPYRIGHT OFFICE	
APPLICATION	Sept 18, 1950
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FEE	$4. 63464 Sept 18, 1950

16—63905-1

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CASE NO. 5879 Enc. 1. ADMITTED IN EVIDENCE NOV 20 1952

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PLAIN PLAINTIFF'S EXHIBIT NO. "5" 36

CASE NO. 5879 Civil.

ADMITTED IN EVIDENCE NOV 20 1952

REGISTRATION NO. CLASS

GOH 1738 H

REPRODUCTION OF A WORK OF ART FORM H

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A REPRODUCTION OF A WORK OF ART

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Sam B. Warner
Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):
Raglor of California
732 South Maple Avenue, Montebello, California

2. TITLE OF WORK EGYPTIAN DANCER FEMALE

3. AUTHORS (The word "Author" includes an employer in the case of works made for hire). Full name (including middle name) and pseudonym (if any):

(a) Author of the reproduction:
NAME Rena (First) Evelyn (Middle) Stein (Last) CITIZENSHIP U. S. A. (Give name of country)
DOMICILE 732 South Maple Avenue, Montebello, California (Address)

(b) Author of original work which has been reproduced:
NAME Rena (First) Evelyn (Middle) Stein (Last)

4. PUBLISHER AND DATE:
(a) Published by Raglor of California (Name) at 732 South Maple Avenue (Place)
(b) Date first placed on sale, sold, or publicly distributed January 25, 1950 (Month, day, and year)

5. IF PRODUCED OUTSIDE THE UNITED STATES by lithographic or photoengraving process, state where ..... (Country)

6. SEND CERTIFICATE, REFUND (IF ANY), AND OTHER COMMUNICATIONS TO:

NAME Raglor of California
ADDRESS 732 South Maple Avenue (Number and Street)
Montebello, California (City) (Zone) (State)

DATES OF RECEIPT IN COPYRIGHT OFFICE
APPLICATION September 18, 1950
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Two copies October 2, 1950 1 c. October 19, 1950

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PLAINTIFF'S EXHIBIT NO. "6"

37

PLAINTIFF'S _____

CASE NO. 5879 Civil.

ADMITTED IN EVIDENCE NOV 20 1952

REGISTRATION NO. OcH 1737 CLASS H

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A REPRODUCTION OF A WORK OF ART

REPRODUCTION OF A WORK OF ART **FORM H**

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Sam B. Warner
Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

Regler of California

732 South Maple Avenue, Montebello, California

2. TITLE OF WORK: EGYPTIAN DANCER MALE

3. AUTHORS (The word "Author" includes an employer in the case of works made for hire). Full name (including middle name) and pseudonym (if any):

(a) Author of the reproduction:

NAME: Rena (First) Evelyn (Middle) Stein (Last) CITIZENSHIP: U. S. A. (Give name of country)

DOMICILE: 732 South Maple Avenue, Montebello, California (Address)

(b) Author of original work which has been reproduced:

NAME: Rena (First) Evelyn (Middle) Stein (Last)

4. PUBLISHER AND DATE:

(a) Published by Regler of California (Name) at 732 South Maple Avenue (Place)

(b) Date first placed on sale, sold, or publicly distributed January 25, 1950 (Month, day, and year)

5. IF PRODUCED OUTSIDE THE UNITED STATES by lithographic or photoengraving process, state where _____ (Country)

6. SEND CERTIFICATE, REFUND (IF ANY), AND OTHER COMMUNICATIONS TO:

NAME: Regler of California

ADDRESS: 732 South Maple Avenue (Number and Street)

Montebello, California (City) (Zone) (State)

DATES OF RECEIPT IN COPYRIGHT OFFICE	
APPLICATION	September 18, 1950
ONE COPY	
TWO COPIES	October 2, 1950 1a October 12, 1950 1a

47x

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[fol. 47-y] PLAINTIFF'S EXHIBIT No. 7

Case No. 5879 Civil

Admitted in Evidence Nov. 20, 1952

REGULATIONS OF THE COPYRIGHT OFFICE

CODE OF FEDERAL REGULATIONS

Title 37—Patents, Trade-marks and Copyrights

Chapter II—Copyright Office, Library of Congress

[fol. 47-z] § 202.8. *Works of art (Class G)*—(a) *In general.* This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. Works of art and models or designs for works of art are registered in Class G on Form G, except published three-dimensional works of art which require Form GG.

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(Here follow 3 photolithographs, side folios 47aa, 47bb-47dd, 47ee)

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PLAINTIFF'S EXHIBIT NO. "12"

40A

Profit

ASE NO. 5879-Civil

ADMITTED IN EVIDENCE NOV 20 1952

with

EGLOR
OF
IFORNIA
TRADE MARK REG.

All designs available as statues only, less one-third of price shown

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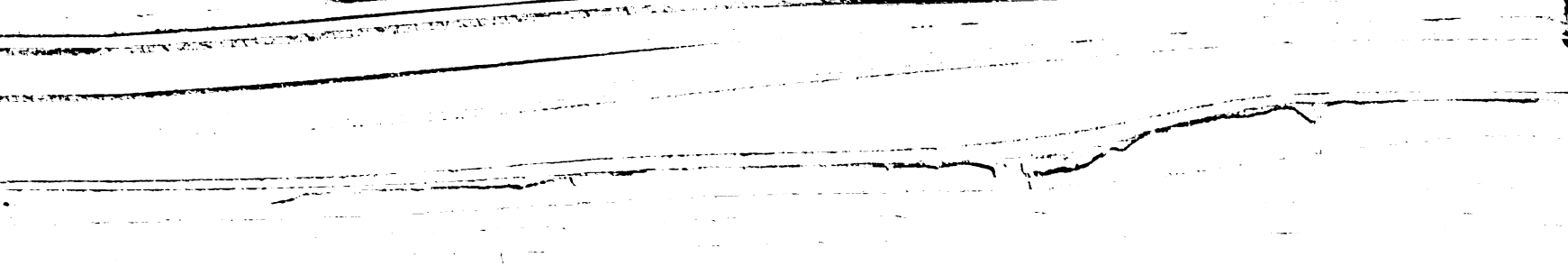

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REGLOR OF CALIFORNIA

732 South Maple Avenue • UN. 0-1141 • Montebello, California

Style #953
Ballet, Male
Ht.36" 18.95

Style #961
New Ballet
Male
Ht.29" 16.95

Style #967
Screen Free
Form
Ht.35" 16.95

Style #954
Curve and
Berries
Ht.26" 14.95

Style #962
Egyptian
Fem.
Ht.30" 19.95

Style #968
String
Symphony
Ht.34" 17.95

Style #957
Form and
Drape
Ht.29" 16.95

Style #963
Egyptian
Male
Ht.30" 19.95

Style #969
Carved Free
Form
Ht.33" 17.95

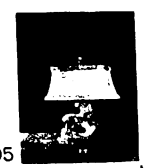
Style #958
Winding
Ribbon
Ht.28" 16.95

Style #964
Television
Ht.16" 9.25

Style #970
New Winding
Ribbon 17.95
Ht.39" 18.95

Style #959
Tropic Leaf
Ht. 29" 16.95

Style #965
Headboard
Ht.18" 13.95



Style #971
Loving Drape
Ht.37" 17.95

Style #960
New Ballet
Fem.
Ht.29" 16.95

Style #966
String Free
Ht.33" 16.95

Style #972
Curved
Floral
Ht.29" ~~18.95~~ 17.95

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PLAINTIFF'S EXHIBIT NO. "15"

CASE NO. 5879 Civil.

ADMITTED IN EVIDENCE NOV 20 1952

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$18.95
2 for $35.00
Matched Pairs, Male & Female. You have seen these at double the price.
Combination colors red & gray—gray & black—chartreuse & black. Full 26" high. Exactly as shown.
Convenient Terms—Nothing Down
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417-19-21 S. HIGHLAND AVE. EA. 1047
on HIGHLAND at EASTERN AVE. EA. 1067
Open Thursday, Friday & Saturday 'Til 9 P.M.
SAVE
GOOD FOR MONDAY ONLY

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[fol. 47ff] DEFENDANT'S EXHIBIT No. 2

UNITED STATES DISTRICT COURT, DISTRICT OF MARYLAND

Civil Action No. 5879

B. STEIN, et al.,

v.

E. L. MAZER, et al.

Representative Group of Design Patents

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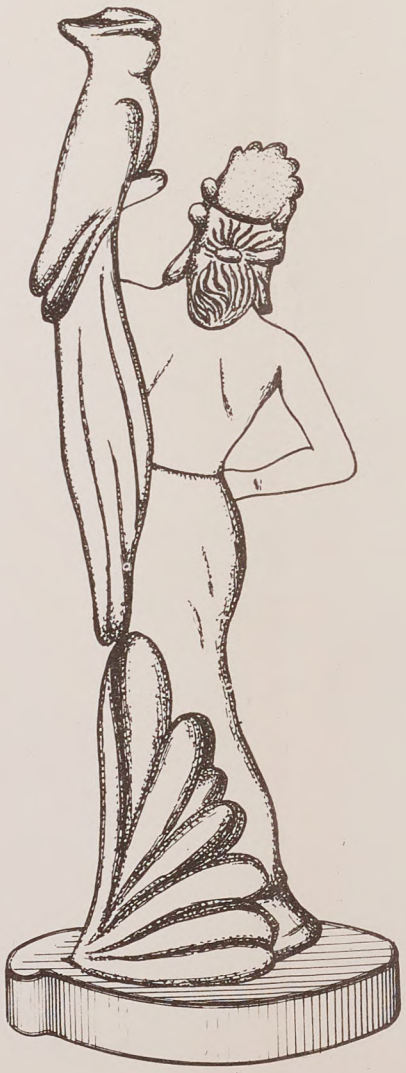
May 6, 1952 L. BENIGNI Des. 166,656

LAMP BASE

Filed Feb. 4, 1952

Fig. 1

Fig. 2



INVENTOR.
Louis Benigni,
BY Mildred Oncken
Atty

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Patented May 6, 1952

Des. 166,656

UNITED STATES PATENT OFFICE

166,656

LAMP BASE

Louis Benigni, Chicago, Ill.

Application February 4, 1952, Serial No. 18,377

Term of patent 7 years

(Cl. D48—20)

To all whom it may concern:

Be it known that I, Louis Benigni, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented a new, original, and ornamental Design for a Lamp Base, of which the following is a specification, reference being had to the accompanying drawing, forming a part hereof.

In the drawing:

Fig. 1 is a front perspective view of a lamp base, showing my new design; and

Fig. 2 is a rear perspective view thereof.

I claim:

The ornamental design for a lamp base, substantially as shown.

LOUIS BENIGNI.

No references cited.

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Nov. 15, 1949 R. SOLOFF ET AL Des. 156,050

LAMP BASE

Filed March 22, 1949

FIG. 1.

FIG. 2.

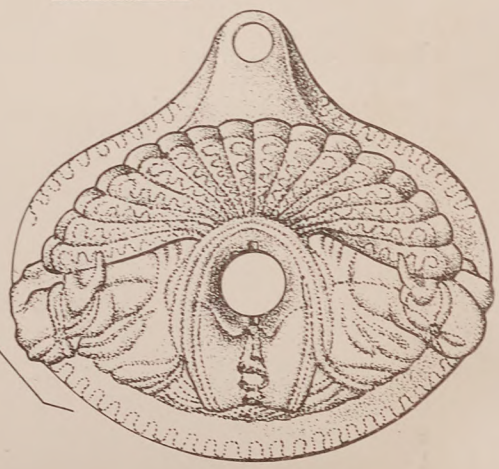
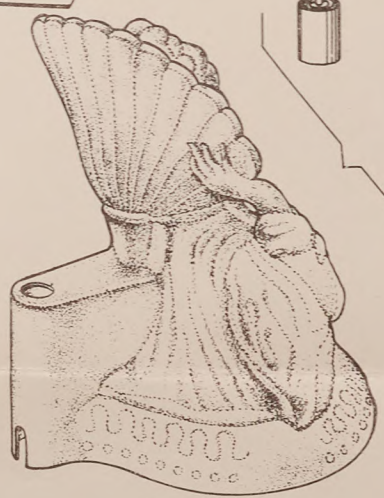


FIG. 3.



INVENTOR.
ROBERT SOLOFF
MORRIS N. NAUMOFF
BY Ostrolenk & Faber
ATTORNEYS

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Patented Nov. 15, 1949

Des. 156,050

UNITED STATES PATENT OFFICE

156,050

DESIGN FOR A LAMP BASE

Robert Soloff, Forest Hills, N. Y., and Morris M. Naumoff, Greensburg, Pa., assignors, by mesne assignments, to Keg-o Products Corp., New York, N. Y., a corporation of New York

Application March 22, 1949, Serial No. 1,542

Term of patent 7 years

(Cl. D48—20)

To all whom it may concern:

Be it known that we, Robert Soloff and Morris M. Naumoff, citizens of the United States, residing at Forest Hills, in the county of Queens and State of New York, and Greensburg, in the county of Westmoreland and State of Pennsylvania, have invented a new, original, and ornamental Design for a Lamp Base, of which the following is a specification, reference being had to the accompanying drawing, forming a part thereof.

Figure 1 is a front perspective view of a lamp base, showing our new design.

Figure 2 is a top plan view thereof with the central part removed; and

Figure 3 is a rear perspective view.

We claim:

The ornamental design for a lamp base, as shown.

ROBERT SOLOFF.
MORRIS M. NAUMOFF.

REFERENCES CITED

The following references are of record in the file of this patent:

UNITED STATES PATENTS

Number	Name	Date
D. 143,232	Miller	Dec. 18, 1945
D. 154,145	Rosner	June 14, 1949

OTHER REFERENCES

Pottery and Porcelain, vol. I, 1944, page 63, Figure #132.

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June 17, 1952 L. A. ARDITTI Des. 167,018

LAMP BASE OR LIKE ARTICLE

Filed Jan. 24, 1952 2 SHEETS—SHEET 1

Fig. 1

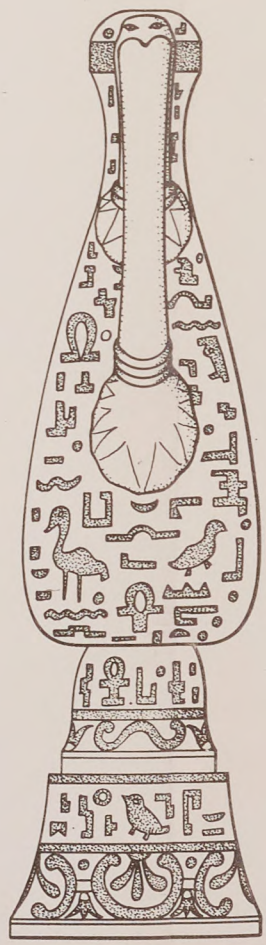

Fig. 2

INVENTOR.
LEON A. ARDITTI
BY
Leon M. Strauss
ATT.

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June 17, 1952 L. A. ARDITTI Des. 167,018

LAMP BASE OR LIKE ARTICLE

Filed Jan. 24, 1952 2 SHEETS—SHEET 2

Fig. 3

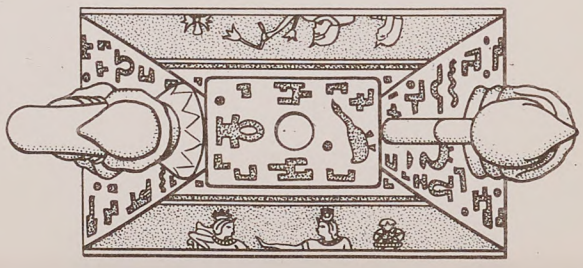

Fig. 4

INVENTOR.
LEON A. ARDITTI
BY
Leon M. Strauss
AGT.

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Patented June 17, 1952

Des. 167,018

UNITED STATES PATENT OFFICE

167,018

LAMP BASE OR LIKE ARTICLE

Leon A. Arditti, New York, N. Y.

Application January 24, 1952, Serial No. 18,209

Term of patent 7 years

(Cl. D48—20)

To all whom it may concern:

Be it known that I, Leon A. Arditti, a citizen of the United States of America, and residing in the city, county and State of New York, have invented a new, original, and ornamental Design for a Lamp Base or like article, of which the following is a specification, reference being made to the accompanying drawing, forming part thereof.

Fig. 1 is a front elevational view of a lamp base or like article, showing my new design;

Fig. 2 is an end elevational view looking at the right of Fig. 1;

Fig. 3 is a rear elevational view; and

Fig. 4 is a top plan view.

I claim:

The ornamental design for a lamp base or like article, substantially as shown.

LEON A. ARDITTI.

No references cited.

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July 1, 1952 D. BOROWITZ Des. 167,133

ELECTRIC LAMP BASE

Filed May 6, 1952

Fig.1

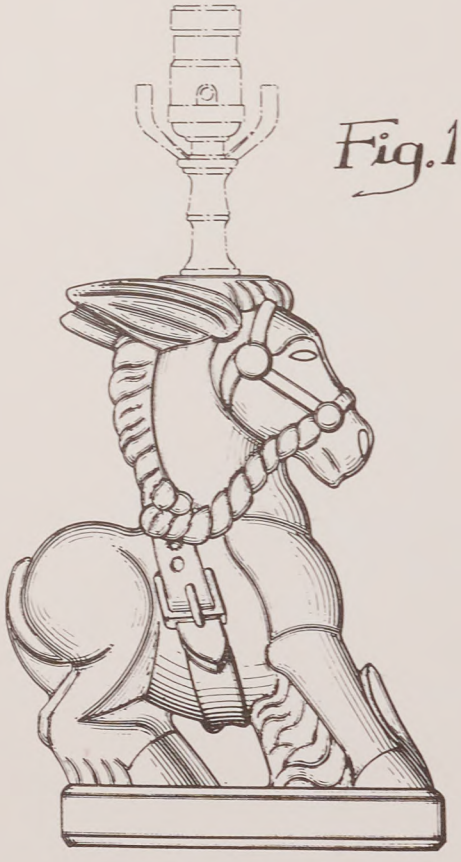


Fig.2

Fig.3

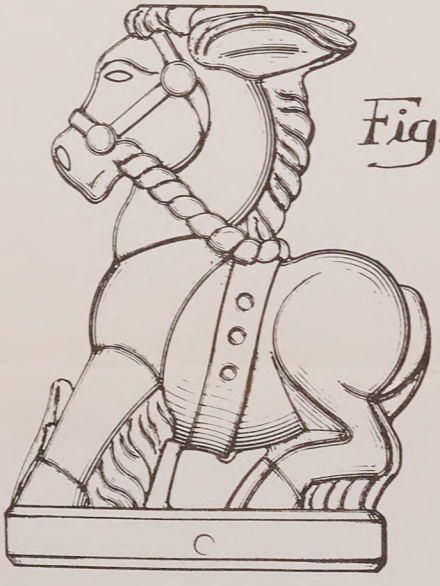
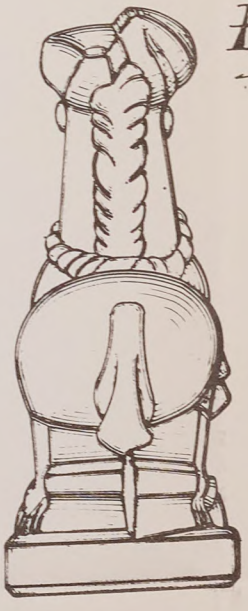


Fig.4



INVENTOR.
DAVID BOROWITZ
BY Morris Spector
Atty.

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Patented July 1, 1952

Des. 167,133

UNITED STATES PATENT OFFICE

167,133

ELECTRIC LAMP BASE

David Borowitz, Chicago, Ill., assignor to Bradley Manufacturing Company, Chicago, Ill., a corporation of Illinois

Application May 6, 1952, Serial No. 19,617

Term of patent 3½ years

(Cl. D48—20)

To all whom it may concern:

Be it known that I, David Borowitz, a citizen of the United States, and a resident of Chicago, Illinois, have invented a new, original, and ornamental Design for an Electric Lamp Base, of which the following is a specification, reference being had to the accompanying drawing, forming a part thereof.

Figure 1 is a side elevational view of an electric lamp base, embodying my new design.

Figure 2 is a front elevational view thereof, the broken lines indicating a standard and socket being omitted for convenience and illustration;

Figure 3 is a side elevational view thereof showing the side opposite Figure 1, the broken lines indicating a standard and socket being omitted for convenience of illustration; and

Figure 4 is a rear elevational view thereof, the broken lines indicating a standard and socket being omitted for convenience of illustration.

The dominant features of my present design lie in the portions shown in full lines.

I claim:

The ornamental design for an electric lamp base, substantially as shown and described.

DAVID BOROWITZ.

REFERENCES CITED

The following references are of record in the file of this patent:

UNITED STATES PATENTS

Number	Name	Date
D. 150,468	Sebel	Aug. 3, 1948

OTHER REFERENCES

Gift and Art Buyer, January 1945, page 127.

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Nov. 22, 1949 T. ESTELLA Des. 156,081

TABLE LAMP

Filed Oct. 15, 1948 2 Sheets-Sheet 1

Fig. 1

INVENTOR
THOMAS ESTELLA
BY. Nicholas J. Garofalo
ATTORNEY

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Nov. 22, 1949 T. ESTELLA Des. 156,081

TABLE LAMP

Filed Oct. 15, 1948 2 Sheets-Sheet 2

FIG. 2

INVENTOR.
THOMAS ESTELLA
BY. Nicholas J. Gaudio
ATTORNEY

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Patented Nov. 22, 1949

Des. 156,081

UNITED STATES PATENT OFFICE

156,081

DESIGN FOR A TABLE LAMP

Thomas Estella, Long Island City, N. Y.

Application October 15, 1948, Serial No. 149,127

Term of patent 7 years

(Cl. D48—20)

To all whom it may concern:

Be it known that I, Thomas Estella, a citizen of the United States, residing at 21—14 25th Street, Long Island City, county of Queens, New York, have invented a new, original, and ornamental Design for a Table Lamp, of which the following is a specification, reference being had to the accompanying drawings, forming a part thereof.

Fig. 1 is a front view of a table lamp showing my new design, and

Fig. 2 is a rear view thereof.

I claim:

The ornamental design for a table lamp, substantially as shown.

THOMAS ESTELLA.

REFERENCES CITED

The following references are of record in the file of this patent:

Webster's Collegiate Dictionary, 1940, p. 729, illustration, lower right.

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Nov. 23, 1948. R. E. GIFFORD Des. 151,817

PLANTER LAMP

Filed June 20, 1947

Fig-1

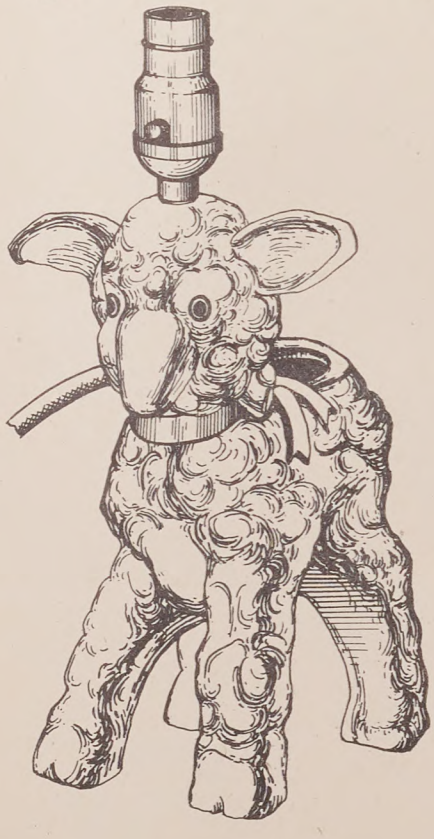

Fig-2

Inventor
Robert E. Gifford
By-
Raymond D. Schnoor
Atty.

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Patented Nov. 23, 1948

Des. 151,817

UNITED STATES PATENT OFFICE

151,817

DESIGN FOR A PLANTER LAMP

Robert E. Gifford, Farnsworth, Ill.

Application June 20, 1947, Serial No. 139,837

Term of patent 3½ years

(Cl. D48—20)

To all whom it may concern:

Be it known that I, Robert E. Gifford, a citizen of the United States of America, residing at Farnsworth, Great Lakes Naval Reservation, in the county of Lake and State of Illinois, have invented a new, original, and ornamental Design for Planter Lamp, of which the following is a specification, reference being had to the accompanying drawing, forming a part thereof.

Referring to the drawing;

Figure 1 is a three-quarter front view in perspective, showing my new design; and

Figure 2 is a similar rear view in perspective.

I claim:

The ornamental design for a planter lamp, as shown.

ROBERT E. GIFFORD.

REFERENCES CITED

The following references are of record in the file of this patent:

Royal Haeger Lamps, Cat. B, received June 9, 1941, p. 13, item 4115.

Gift and Art Buyer, Oct. 1944, p. 101, see lamp, upper left.

Gift and Art Buyer, Jan. 1946, p. 114.

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[fol. 164] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 5879—Civil

BENJAMIN STEIN and RENA STEIN, dba REGLOR OF CALIFORNIA

vs.

EMANUEL L. MAZER and WILLIAM ENDICTER, dba JUNE LAMP MANUFACTURING COMPANY

[fol. 165] OPINION—Filed February 20, 1953

COLEMAN, J.:

This proceeding is for alleged infringement of six copyrights for small three-dimensional statuettes of male and female dancing figures made of semi-vitreous china, registration of which was granted to the plaintiffs by the Copyright Office.

The plaintiffs, husband and wife, are citizens of California, doing business as partners, in Montebello, California, under the name of Reglor of California, in the design and casting of small statuary. The defendants are citizens of Maryland and, as partners, do business under the name of June Lamp Manufacturing Company, in Baltimore, as assemblers of table lamps which they sell, both wholesale and retail, throughout the country.

Registration of the statuettes here in issue was applied for and obtained by plaintiffs in 1950 under section 5(g), Title 17, U.S.C.A., entitled "Copyrights—Classification of work for Registration", which provides as follows: "The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: * * *.

"Works of Art; Models of Design for Works of Art".

[fol. 166] As registered, all of the statuettes are of dancers, male and female, purely ornamental and disclose no lamp attachments, although, with very few exceptions, the plaintiffs have never sold any of their statuettes other than

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as complete table lamps, that is, with the statuette figure as the lamp base and the lighting parts fitted thereto,—the electric wiring, sockets, and lamp shades. Similarly, the defendants' statuettes which are alleged by plaintiffs to infringe their own statuettes and are of identical size, design and conformation, have always been sold by the defendants as table lamps, that is, with the electric wiring, sockets, and lamp shades included,—never merely as statuettes.

Plaintiffs contend that, in spite of the fact that, as registered in the Copyright Office, their statuettes disclose no lamp attachments, they, nevertheless, by such registration, have obtained the right to exclude anyone from manufacturing or selling statuettes of the same form and design, regardless of the fact that they may be converted, as defendants have converted their identical statuettes, to a utilitarian purpose, namely, to electric table lamps.

Defendants deny that plaintiffs' copyrights give them any such monopoly, since the registration of the copyrights for plaintiffs' statuettes was secured for them as "works [fol. 167] of art" under the copyright laws, whereas the statuettes that they sell are not "works of art" as defined in these laws, but are articles of manufacture for utilitarian purposes and, if entitled to protection, such is to be obtained not under the copyright but under the patent laws.

We have already quoted the pertinent provision of the copyright laws under which plaintiffs obtained their copyrights. In furtherance of this provision, the Copyright Office has adopted the following regulation (Regulation 20.8, 17 C.F.R., Chapter II, 202.8; 17 U.S.C.A. foll. sec. 207): "Works of Art (Class G—(a) General. This class includes works of artistic craftsmanship, insofar as their form *but not their mechanical or utilitarian aspects are concerned,* such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings *and sculpture.* Works of art and models of designs for works of art are registered in Class G on Form G, except published three-dimensional works of art which require Form GG." (Emphasis supplied). Previous regulations going back for a number of years were to the same effect, with only some variation in phraseology.

The Copyright Office, under the jurisdiction of the Lib-

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rary of Congress, upon the filing of an application for copyright registration and the payment of the requisite filing [fol. 168] fee, issues a certificate of copyright, provided the application is found to fall within one of the classes for which the copyright law provides, and meets the regulations of the Copyright Office promulgated with relation thereto. Thus, the issuance of the certificate of copyright is a perfunctory matter. The Copyright Office conducts no examination to determine the existence of novelty or invention in the subject matter. The certificate, when issued, is effective for a term of 28 years and may be renewed perfunctorily for another like term.

Under the patent laws (Sections 4929 and 4933 of the Revised Statutes, 35 U.S.C.A., Sec. 73 (n), provision is made for design patents, as follows: "Any person who has invented any new, original, *and ornamental design for an article of manufacture,* not known or used by others in this country before his invention thereof and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than one year prior to his application thereof and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may * * * obtain a patent therefor.

"All the regulations and provisions which apply to ob- [fol. 169] taining or protecting patents for inventions or discoveries not inconsistent with the provision of this title, shall apply to patents for *designs.*" (Emphasis supplied).

The section of the patent laws that deals with infringement of design patents provides as follows (35 U.S.C.A. Sec. 74): "During the term of *letters patent for a design,* it shall be unlawful for any person other than the owner of said letters patent, without a license of such owner, *to apply the design* secured by such letters patent, or any colorable imitation thereof, *to any article of manufacture* for the purpose of sale, or to sell or expose for sale any *article of manufacture* to which such design or colorable imitation shall, without the license of the owner, have been applied, knowing that the same has been so applied * * *." (Emphasis supplied).

Design patents have been provided for by Acts of Con-

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gress since 1842, when the first design patent Act was passed, and a great *a*many design patents on articles of manufacture have been granted throughout the years. See Gorham vs. White, 81 U. S. 511; Glen Raven Knitting Mills vs. Fanson Hosiery Mills, 189 F. (2d) 845. Briefly summarized, the procedure in the Patent Office with respect to design patents, is that, upon the filing of an application for [fol. 170] such a patent, including a drawing of the design, a description thereof and claim therefor, the Patent Office conducts a critical examination of the pertinent prior art on record in the Patent Office to determine whether the design is new, original, and ornamental, and possesses the quality of invention. If these requirements are met, the Patent Office then may issue a patent for the design for a term of either 3½, 7 or 14 years, at the applicant's election, with a sliding scale of fees. 35 U.S.C.A. Secs. 77, 78. Design patents are not renewable. The designs become public property when the patents for them expire.

It is readily apparent from a comparison of the foregoing provisions of the copyright laws relative to "Works of Art" with those of the patent laws relative to ornamental design for articles of manufacture, that there is a distinct difference between what is contemplated by these separate laws. And so it has been stated in numerous decisions. See especially Lithographic Co. v. Sarony, 111 U.S. 53; Taylor Instrument Company vs. Fawley-Brost Co., 139 F. (2d) 98, cert. den. 321 U.S. 785.

It is unfortunately true that the Supreme Court has never squarely ruled upon this distinction, as applied to facts such as exist in the case before us. However, in [fol. 171] Stein vs. Expert Lamp Company, 188 F. (2d) 611, a decision of the Court of Appeals for the Seventh Circuit, rendered in 1951, where the plaintiffs were the same as in the present case, the distinction between the scope of the copyright and the patent laws was recognized. There, these same plaintiffs sued the Expert Lamp Company for infringement of statuettes very similar to those here involved. The District Court dismissed the complaint (96 F. Supp. 97), holding that the plaintiffs' submission to the Copyright Office of the statuettes with so-called mounting stubs for electric lamp sockets was evidence of the practical use to which the statuettes were intended to be put, and that the

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plaintiffs could not monopolize such use under the copyright statute. Plaintiffs petitioned the District Court to reconsider the case on the ground that their counsel had, entirely through inadvertence, mistakenly misinformed the Court in the course of the original hearing that the statuettes filed with the Copyright Office, on which registration was granted, embodied lamp mounting-stubs, which was not the case. This petition was denied on the ground that what it disclosed was "immaterial to the decision in this case."

On appeal the District Court was affirmed, rehearing was also denied and the Supreme Court denied certiorari. [fol. 172] 342 U.S. 829. The appellate court said (188 F. (2d) at 612-613): "In arguing for a reversal, plaintiffs make the point that the fact that the statuette may be utilized for some practicable use does not change the character of it. They insist that a s-ulptured statue is a 'work of art', and since statuary is registrable matter they are entitled to protection, and the copyrights must be enforced. On the other hand, defendants contend that plaintiffs' copyrights do not cover or protect an electric table lamp, and that the Copyright Office cannot grant a monopoly on such a device. In support of plaintiffs' contention they cite, among other cases, 23 S. Ct. 298, 47 L. Ed. 460; Pelligrini v. Allegrini, D.C., 2 F. 2d 610; and United States v. Backer, 2 Cir., 134 F. 2d 533. *We have examined and considered all the cases cited but are not persuaded that a design of an electric lamp may be protected as a monopoly by means of a copyright registration, registered without an examination as to originality, novelty or inventiveness.* (Emphasis supplied).

"Congress has provided two separate and distinct classes or fields of protection, the copyright and the patent. Copyright registrations are granted by filing with the Copyright Office two reproductions of the 'work of art' with [fol. 173] copyright notice and a fee of $4.00. The Copyright Office makes no examination or search as to the originality or novelty of the claimed 'work of art'. Applications for design patents are filed in the United States Patent Office and are subject to an examination in which the examiner searches through all available publications, prior patents and all prior art available, to determine if the

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design possesses the qualities requisite to granting a design patent.

"It is true that the Copyright Act protects 'Works of Art; models or designs for works of art', but the Act does not refer to articles of manufacture having a utilitarian purpose nor does it provide for a previous examination by a proper tribunal as to the originality of the matter offered for copyright * * *."

Following the Appellate Court's opinion, the case again came before the District Court on the matter of assessment of attorneys' fees and costs, pursuant to the copyright statute (17 U.S.C.A. Sec. 116), and in a memorandum opinion (unreported) the District Judge said: "The pertinent feature compelling the Court to make the decision of January 23, 1951, was the submission to the Copyright Office of plaintiffs' statuette 'having the threaded mounting stub to receive a lamp socket.' This technicality and the [fol. 174] interpretation accorded the copyright statute defeated the plaintiffs' claim."

Plaintiffs, in the present suit, would have us hold that in the Expert Lamp Company case the Court of Appeals did no more than affirm the above quoted narrow interpretation by the District Court of its own holding, and that as a result we should rule in plaintiffs' favor in the present case, since registration of all the copyrights involved in the present case was granted upon specimen statuettes deposited with the Copyright Office which were without any lamp attachments. Suffice it to say that we find this reasoning to be entirely without merit. To follow it would be to torture the very language of the appellate court's opinion which we have above quoted, especially the statement (188 F. (2d) 611, at 612) that "We have examined and considered all the cases cited *but are not persuaded that a design of an electric lamp may be protected as a monopoly by means of a copyright registration, registered without an examination as to originality, novelty or inventiveness.*" (Emphasis supplied). We interpret the phrase in the foregoing, "by means of a copyright registration", as intended to be read as "by means of *any* copyright registration".

[fol. 175] Thus believing that the Seventh Circuit Court of Appeals is correct in its reasoning and conclusions, its

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decision should be followed in the present case. In fact, contrary to the contention made by counsel for plaintiffs, that decision is consistent with the long-established practice of the Copyright Office in granting copyrights for artistic lamps of various sorts. The testimony of the present Register of Copyrights was that the provision in section 202.8 of the Copyright Office Regulations, which we have above quoted, that Class (G)—(a) "General Works of Art" include "works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned", is interpreted by the Copyright Office and by its examiners "to permit them to deal only with the question of whether the work is a work of artistic craftsmanship, and to consider as immaterial whether the work may also have a mechanical or utilitarian aspect." The Register explained that the 1909 amendments to the Copyright Laws changed the specification of "works of the fine arts" to the broader term, "works of art" because Congress wanted to include some subject matter, as for instance, that of applied design, not yet within the province of design patents, but believed to be entitled to copyright protection; and that [fol. 176] following this change in the law, the practice developed in the Copyright Office of registering works of art which were determined to be such, even if not works of *fine* art in the strict sense, and even if they had a utilitarian aspect; and that thus, by issuing a certificate of registration the Office purported to give applicant *no* rights so far as any mechanical or utilitarian purpose is concerned.

Counsel for plaintiffs rely upon Stein v. Rosenthal, 103 F. Supp. 227, a decision of the District Court for the Southern District of California. There, the same plaintiffs as those before us sued a citizen of California for infringement of four of the same copyrights here in suit. The Court held there was infringement. We quote at some length the following from the Court's opinion (103 F. Supp. 227, at 229-231): "An Opinion is indicated because contentions have been made that the copyrights involved in this case are invalid for the same reasons which voided the same plaintiffs' copyrights of similar subject matter in Stein v. Expert Lamp Co., 7 Cir., 1951, 188 F. 2d 611, Id., D.C., 96 F. Supp. 97. There are points of similarity and also points

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of dissimiliarity between the facts in this case and those in the cited case.

"Plaintiffs are copyright proprietors concerning four [fol. 177] copyrights for which the Register of Copyrights has issued certificates of registration in Class H, identified as Certificates 1721, 1723, 1737 and 1738. The certificates relate to statuettes or sculpture entitled Male and Female Curved Ballet Dancers; Egyptian Dancer, Male; and Egyptian Dancer, Female. Under the the partnership style Reglor of California, plaintiffs have reproduced and sold many copies in the form of statuettes, each one of which has been marked with the required statutory notice. A few copies of some of the statues were sold simply as statuettes. By far the greater number were wired with electrical assemblies to which lamp shades were attached and were sent to the retail market by plaintiffs as the supporting bases of fully assembled table lamps.

"The photographs of the statuettes deposited with the Copyright Office, as part of the claimed copyright in a reproduction of a work of art, are photographs of mere statues alone without electrical assemblies, lamp shades, lamp mounting stubs or any other addition to the purely artistic sculpture. Insofar as the copyright registration shows, the several works registered are statues only. There is no suggestion in any of the several claims to copyright of any claim except the form of the figures. There are no mechanical or utilitarian aspects to the statues. None of the [fol. 178] claims to copyright suggest any utilitarian use and if adaptability to such a purpose were to be sought solely from examination of the copyrighted material, the result would be negative.

* * * * * * *

"Plaintiff's copies of their protected statues, as used in their lamp business, differed from the copyrighted originals in that they were cast with electrical conduits and mounting stubs added to the sculpture. So were the copies cast for the defendants by Valentino Santi, the third party defendant. In this respect they materially differed from original statues submitted for the registration which had been perfected under Section 5 (g) of Title 17, United States Code

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Annotated. It is this difference which distinguishes this case from Stein v. Expert Lamp Company, 7 Cir., 1951, 188 F. 2d 611, Id., D. C., 96 F. Supp. 97. (Both Opinions should be read to get all of the facts). *But for* the addition of mounting stubs which adapted them to the lamp manufacturer's use, the infringing copies were identical with the non-utilitarian originals depicted on the registration certificates.

* * * * * * *

"We have been referred to the familiar rule that protection of productions of the industrial arts, utilitarian in purpose and character, even if artistically made or ornamented, [fol. 179] depends upon action under the Patent Law rather than the Copyright Act which gives protection to, Section 5 (g), 17 U.S.C.A., 'Works of art; models or designs for works of art'. This poses the question whether the registered sculpture is an article utilitarian in purpose and character. The Court holds that as registered, it is not. Each of the statuettes is mere art. It need not be fine art. The word 'fine' was stricken from the Act of March 4, 1909. Jones Bros. Co. v. Underkoffler, D. C., 16 F. Supp. 729. To be eligible it must be not utilitarian in itself. *Having qualified for registration by reason of its purely artistic character, the question presented is whether an intent on the part of the claimant to copy such protected sculpture in such a way as to artistically enhance some separate and utilitarian article of manufacture destroys the right to copyright. The argument that this is so is but another vehicle to carry defendants' philosophy that if the artist intends to profit by his creation he cannot acquire protection. To uphold this argument would be to require the Judicial inquiry to plumb the mind of every copyright proprietor and determine his plans and intentions as of the time of registration. This impossibility is not contemplated by the Statute.*

"*It is recognized that copyright protection existing for original art does not extend to protecting a table lamp* [fol. 180] *which employs a copy of the protected art as part of its ornamentation. The copyright proprietor's right is limited to the right to make or use copies of the protected material.* Bleistein v. Donaldson Lithographing Co., 188

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U.S. 239, 23 S. Ct. 298, 47 L. Ed. 460. *This protection is absolute and the copyrighted art under protection of valid copyrights cannot be copied for any purpose without consent of the proprietor. Thus when copied and used, as defendants have used it, in decoration of a utilitarian object, there is an infringement for which damages will be allowed for past infringing acts and injunctive relief issued against future like wrong.''* (Emphasis supplied).

The Rosenthal decision is now on appeal. We find unconvincing the District Court's reasoning in that case, including the interpretation given to the decision of the appellate court in The Expert Lamp Company case, whereby a basis for difference in conclusion is rested upon alleged important factual differences. Therefore, we are not disposed to follow the Rosenthal decision.

For the reasons herein given, the complaint must be dismissed.

[fol. 181] Reporter's Certificate to foregoing paper omitted in printing.

[fols. 182-190] IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil Action No. 5879

BENJAMIN STEIN and RENA STEIN, doing business as REGLOR OF CALIFORNIA, Plaintiffs,

vs.

EMANUEL L. MAZER and WILLIAM ENDICTER, doing business as JUNE LAMP MANUFACTURING COMPANY, Defendants.

DECREE—Filed January 8, 1953

This case having been fully tried and heard before me on its merits, and in accordance with the Memorandum Opinion of this Court,

It is ordered, adjudged and decreed:

1. That, in accordance with the Courts oral opinion, the Complaint and Amended Complaint be, and it is hereby dismissed with prejudice.

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2. That Plaintiffs' Petition for Reconsideration be, and it is hereby denied,

3. That Defendants' request for attorneys' fees be, and it is hereby denied,

4. That the costs be, and they are hereby assessed against Plaintiffs.

William C. Coleman, Chief Judge, United States District Court. Approved as to Form—Will Freeman, George E. Frost, Attorneys for Plaintiffs, Max R. Kraus, Attorney for Defendants.

Date—January 8th, 1953.

(File endorsement omitted)

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[fol. 33] PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6572

BENJAMIN STEIN and RENA STEIN, Doing Business as Reglor of California, Appellants,

versus

EMANUEL L. MAZER and WILLIAM ENDICTER, Doing Business as June Lamp Manufacturing Company, Appellees

Appeal From the United States District Court for the District of Maryland, at Baltimore

February 24, 1953, record on appeal filed and cause docketed.

Same day, original exhibits certified up.

Same day, appearance of Will Freeman, George E. Frost and Joseph T. Brennan, 2d, entered for the appellants.

March 2, 1953, appearance of Max R. Kraus entered for the appellees.

Same day, statement under section 3 of rule 10 filed.

March 17, 1953, brief and appendix of appellants filed.

March 24, 1953, petition of appellees for leave to file brief in excess of 50 printed pages filed.

ORDER PERMITTING APPELLEES TO FILE BRIEF NOT EXCEEDING 65 PAGES—Filed March 26, 1953

(Style of Court and Title Omitted)

Upon the application of the Appellees, by their counsel, and for good cause shown,

[fol. 34] Special permission is hereby granted Appellees in the above entitled case to file brief in excess of 50 printed pages, but not exceeding 65 printed pages.

March 25, 1953.

John J. Parker, Chief Judge, Fourth Circuit.

April 10, 1953, motion of Register of Copyrights for leave to file brief as amicus curiae filed.

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ORDER GRANTING LEAVE TO FILE BRIEF AS AMICUS CURIAE—Filed and Entered April 10, 1953

(Style of Court and Title Omitted)

Upon the motion of the Register of Copyrights, and for good cause shown,

Leave is hereby granted said Register of Copyrights to file a brief as *amicus curiae* in the above entitled case.

April 10, 1953.

John J. Parker, Chief Judge, Fourth Circuit.

April 10, 1953, brief of Register of Copyrights as amicus curiae filed.

April 13, 1953, reply brief of appellants filed.

April 16, 1953, twenty-five printed copies of brief of Register of Copyrights as amicus curiae filed.

ARGUMENT OF CAUSE

April 17, 1953 (April term, 1953), cause came on to be heard before Parker, Chief Judge, and Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

April 27, 1953, motion of appellees for leave to file reply to amicus curiae brief filed.

[fol. 35] ORDER GRANTING APPELLEES LEAVE TO FILE REPLY TO AMICUS CURIAE BRIEF—Filed April 27, 1953

(Style of Court and Title Omitted)

Upon the motion of the Appellees, by their counsel, and for good cause shown,

Leave is hereby granted the Appellees to file a reply to the Amicus Curiae Brief of Register of Copyrights filed in the above case on April 16, 1953.

April 25, 1953.

John J. Parker, Chief Judge, Fourth Circuit.

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[fol. 36] OPINION—Filed May 19, 1953

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6572

BENJAMIN STEIN and RENA STEIN, Doing Business as Reglor of California, Appellants,

versus

EMANUEL L. MAZER and WILLIAM ENDICTER, Doing Business as June Lamp Manufacturing Company, Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. Civil

Argued April 17, 1953. Decided May 19, 1953

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges

George E. Frost (Joseph T. Brennan, 2d, and Will Freeman on brief) for Appellants; Max R. Kraus for Appellees; and Warren E. Burger, Assistant Attorney General, Paul A. Sweeney and Benjamin Forman, Attorneys, Department of Justice, and George D. Cary, United States Copyright Office, on brief for the Register of Copyrights as *amicus curiae.*

[fol. 37] DOBIE, Circuit Judge:

Plaintiffs instituted a civil action against defendants in the United States District Court for the District of Maryland, seeking an injunction and damages for the alleged infringement of six copyrights for small three-dimensional statuettes of male and female dancing figures made of semi-vitreous china. Registration of these statuettes was duly granted to the plaintiffs by the Copyright Office. The District Court dismissed the complaint of plaintiffs, who have appealed to us. The decision of the District Court appears to be virtually a holding that a work of art which may be, and is, utilized for some practical purpose, may be protected only by a design patent and not by copyright. No question of unfair competition is here involved, only the

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validity of the copyrights is in issue. We think the District Court erred in holding the copyrights invalid. The judgment below must, accordingly, be reversed. The Register of Copyrights was permitted to file with us a brief as *amicus curiae*.

The works of plaintiffs here involved were executed by preparing original sketches, sculpturing the resulting figures in clay on a clay armature, and then preparing a mold from the clay sculpture for casting copies. The specimens submitted to the Copyright Office were in statue form. We think these statues may fairly be classified as "works of art."

Plaintiffs are in the business primarily, almost exclusively, of making and selling these statues in lamp form, though a few, very few, of the copyrighted statues have been sold as statues. The copyrighted figures have been sold by defendants as parts of complete lamps, of which they form the base portion. Beyond any dispute, defend- [fol. 38] ants have meticulously and in minute detail copied every element of the copyrighted statues of the plaintiffs.

It is highly important, at the outset, to distinguish between a design patent and a copyright. Although similar in some respects, the two disclose significant differences. Of particular importance here are the requirements for their issuance and registration and the extent of the protection they afford. A design patent may be obtained only for a "new, original and ornamental design for an article of manufacture." 35 U. S. C. A. (1952 Supp.) 171. To be valid, therefore, a patent "must disclose a high degree of uniqueness, ingenuity and inventiveness." *Alfred Bell & Co. Ltd.* v. *Catalda Fine Arts, Inc.*, 191 F. 2d 99, 100. A copyright, on the other hand, may be registered if the particular work is "original," i. e., if it owes its origin to the "author." *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 57-58. It is "valid without regard to the novelty or want of novelty of its subject matter." *Baker* v. *Selden*, 101 U. S. 99, 102.

Because the standards for obtaining copyright protection are of a lower order than those required for design patents, the protection granted under a copyright is more limited. Since a copyright is intended to protect authorship, the essence of copyright protection is the protection of origi-

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nality rather than novelty or invention. *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 249-250; *Baker* v. *Selden*, 101 U. S. 99, 102-104. Said Circuit Judge Frank in *Alfred Bell & Co. Ltd.* v. *Catalda Fine Arts, Inc.*, 191 F. (2d) 99, 103:

> "* * * 'independent reproduction of a copyrighted * * * work is not infringement' whereas it is *vis a vis* a patent. Correlative with the greater immunity of a patentee is the doctrine of anticipation which does not [fol. 39] apply to copyrights: The alleged inventor is chargeable with full knowledge of all the prior art, although in fact he may be utterly ignorant of it. The 'author' is entitled to a copyright if he independently contrived a work completely identical with what went before; similarly, although he obtains a valid copyright, he has no right to prevent another from publishing a work identical with his, if not copied from his. A patentee, unlike a copyrightee, must not merely produce something 'original'; he must also be 'the first inventor or discoverer.' Hence it is possible to have a plurality of valid copyrights directed to closely identical or even identical works. Moreover, none of them, if independently arrived at without copying, will constitute an infringement of the copyright of the others."

More tersely put, "a copyright on a work of art does not protect a subject, but only the treatment of a subject." *F. W. Woolworth Co.* v. *Contemporary Arts*, 193 F. (2d) 162, 164, affirmed, 344 U. S. 228. See, also, Copinger, "The Law of Copyrights" (7th Ed. 1936); Admur, "Copyright Law and Practice" (1936); *Ricker* v. *General Electric Co.*, 162 F. (2d) 141, 142; *Arnstein* v. *Edward B. Marks Music Corporation*, 82 F. (2d) 275; *Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 81 F. (2d) 49, 54; *Gerlach-Barklow Co.* v. *Morris and Bendien*, 23 F. (2d) 159, 161.

The life of a copyright is much longer than that of a design patent. For our purposes, the subject matter of a copyright includes (17 U.S.C.A. § 5 (g) and (h)): "works of art; models or designs for works of art; reproductions of a work of art." The design patent primarily extends to "any new original and ornamental design for an article of manufacture." 35 U. S. C. A. § 171.

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Plaintiffs do not contend that defendants may not law-
[fol. 40] fully produce and sell an electric lamp whose base is a sculptured, human, dancing figure. Nor do plaintiffs contend that defendants may not lawfully produce and sell an electric lamp whose base is an *authorized* copy of the sculptured, human, dancing figures copyrighted by plaintiffs. Plaintiffs argue only that the production and sale of an electric lamp whose base is an *unauthorized* copy of the copyright statue of plaintiffs is an infringement of the copyright. Thus, the issue is not whether a design of an electric lamp may be protected as a monopoly by means of a copyrighted registration. Rather, the issue is whether a copyrighed statue may be *copied* irrespective of its use as a statue or as a component part of an electric lamp, or any other article of manufacture.

We append pertinent portions of the Design Patent Statutes and the Copyright Statute:

The Design Patent Statutes

"1842—(5 Stat., 543)

Section 3. * * * That any citizen * * * who by his * * * own induced any new and original design for a manufacture, whether of metal or other material or materials, or any new and original design for the printing of woolen, silk, cotton, or other fabrics, *or any new and original design for a bust, statute,* or bas-relief or composition in alto or basso relievo, or any new original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed or painted or cast or otherwise fixed on, any article of manufacture, or *any new and* [fol. 41] *original shape or configuration of any article of manufacture,* * * * may obtain a patent therefor." 1861—(12 Stat., 246).

Section 3 of the 1842 Patent Act re-enacted.

1870—(16 Stat., 198).

Section 71. "* * * That any person who, by his own industry, genius, efforts, and expense, has invented or

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produced any new and *original design for a manufacture, bust, statute,* alto-relievo, or bas-relief; any new and original design for the printing of woolen, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast or otherwise placed on or worked into any article of manufacture, or *any new, useful, and original shape or configuration of any article of manufacture,* * * * may, * * * obtain a patent therefor."

1874—(Section 4929, Revised Statutes).

Section 71 of the 1870 Act re-enacted.

1902—(32 Stat., 193).

"Any person who has invented any new, original, and ornamental design for an article of manufacture, * * * may, * * * obtain a patent therefor."

1952—(35 U. S. C. 171, 66 Stat. 792).

"Whoever invents any new, original and *ornamental design for an article of manufacture* may obtain a patent therefor, * * *."

[fol. 42] The Copyright Statutes

1870—(16 Stat., 198, 212).

"Section 86. Any citizen of the United States * * * who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, *statue, statuary, and of models or designs intended to be perfected as works of the fine arts,* * * * shall * * * upon complying with the provisions of this chapter, have the sole liberty of printing, re-printing, publishing, completing, copying, executing, finishing and vending the same, * * *."

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1874—(Section 4952, Revised Statutes.).

Section 86 of the 1870 Act re-enacted.

1909—(35 Stat. 1076).

"Section 5. * * * The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: * * *

(g) *Works of art; models or designs for works of art;*

(h) Reproductions of a work of art; * * *."

1948—17 U.S.C. 5, 61 Stat. 652.

Section 5 of the 1909 Act re-enacted.

(Italics ours.)

Also we set out the applicable Copyright Regulations of 1926 and 1950:

[fol. 43] 1926
Regulation

(17 U. S. C. A. West Bound Vol. p. 182)

"12 (g) *Works of art and models or designs for works of art.* This term includes all works belonging fairly to the *so-called fine arts* (paintings, drawings and sculpture.

The protection of productions of the industrial arts utilitarian in purpose and character, even if artistically made or ornamented *depends upon action under the patent law;* but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

Toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, *or similar articles are examples. The exclusive right to make and sell such articles, should not be sought by copyright registration."*

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Present Regulation

1950

Regulation

(as amended to July 1, 1952)

(17 U. S. C. A. 1 (1952) p. 332-333)

"202.8 Works of art (Class G)—(a) in general. This class includes works of artistic craftsmanship, in so far as their form but *not their mechanical or utilitarian aspects, are concerned,* such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belong-[fol. 44] ing to the fine arts, such as paintings, drawings and sculpture * * *." (Italics ours.)

Certainly very germane here is the testimony of Mr. Arthur Fisher, Register of Copyrights, who speaks from experience and with authority. He is in charge of the Copyright Office and supervises the registration of claims to copyright and the making of rules and regulations by that office. He testified that at the time he came to the Copyright Office in 1946 the practice was well established of registering "any work which in our opinion is a work of art, even though such work has a mechanical or utilitarian aspect." Mr. Fisher further testified that this practice is now covered by Regulation 202.8. From his testimony, we quote:

"* * * it is the practice of the Copyright Office to make a determination as to whether the work submitted is or is not a work of art. The phrase 'insofar as their form but not their mechanical or utilitarian aspects are concerned' is interpreted by the office and by our examiners to permit them to deal only with the question of whether the work is a work of artistic craftsmanship, and they consider, it is our practice to consider as immaterial whether the work may also have a mechanical or utilitarian aspect.

We do not consider that we are registering or dealing with that mechanical or utilitarian aspect but are only dealing with the artistic aspect of the work which is submitted under an application for a work of art.

I might give some example of that. For example, if

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this Daumier etching, engraving that I have on the walls were framed and were submitted to us with some indication that it was to be used as a modern tea tray with a stand, our office would deal only with the artistic aspect of the work and would not be concerned with [fol. 45] the fact that it also had a utilitarian use or purpose.

Again, we frequently will receive applications for the registration of paintings on plates, for example. We register the painting on the plate but we are not concerned with the fact that the material upon which the painting is made may be intended as an article of utility for the handling of food. In other words the practice of the office with respect to this phrase about which I am asked is not to undertake to register or deal with the mechanical or utilitarian aspects, but exclusively to determine whether the work that is submitted to us is a work of art and we disregard the question of whether it has in addition a mechanical or utilitarian function."

Space limitations prevent any extended discussion of the historical development through the years of the Copyright and Design Patent Statutes. It is worthy of note, in connection with our case, however, that in 1902 Congress narrowed the Design Patent Statute to exclude statuary. Even more important was the change in the Copyright Statute when the term "works of fine arts" found in the 1870 Statute was changed and broadened by the substitution in the Statute of 1909 of the words "works of art." Certainly there are many works of art not included in the fine arts. Mr. Herbert Putnam, Librarian of Congress, testifying before a Committee of the House of Representatives, 1906, stated:

"* * * the term 'work of art' is deliberately intended as a broader specification than 'works of the fine arts' in the present statute with the idea that there is subjectmatter (for instance, of applied design, not yet within the province of design patents), which may properly be entitled to protection under the Copyright [fol. 46] Law." See Hearings before Committee of

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Patents, House of Representatives, on S. 6330 & H. R. 19853, 59th Cong., 1st Sess. June 6-9, 1906, p. 11.

Concededly, a copyright does not purport to give to the copyrightee any rights to the mechanical or utilitarian uses of a work of art. A copyright does, however, protect the work of art *qua* work of art without regard to any functional use to which it might be put. A subsequent utilization of a work of art in an article of manufacture in no way affects the right of the copyright owner to be protected against infringement of the work of art itself. The critical inquiry, therefore, is not whether the particular work sought to be registered has utility but whether it is a work of art irrespective of its utility.

Since 1909, it seems to have been the practice of the Copyright Office to grant copyrights to works of art, and to deny copyrights to purely utilitarian objects. An object of artistic conception in a standard art form—e.g., sculpture or painting—has not been denied registration merely because of its possible utilitarian aspects. It is the work of art that is thus protected, not its utilitarian aspects. Thus copyright registration has been granted for stained glass windows, bas-relief bronze doors, sculptures in book-ends, candlestick holders and statuary lamps.

On the other hand, it has been the practice of the Copyright Office since 1909 to refuse copyright registration *only* to those works of a wholly utilitarian nature, which could not be called works of art although they might possess pleasing design. Rejection has been placed on the ground that protection for such works lay only under the Design Patent Law. Thus, registration has been refused for designs for refrigerators, clocks, stoves, gasoline pumps and oil dispensers.

[fol. 47] When an agency of the United States is empowered by a federal statute to issue regulations under, and also to administer and apply, that statute, and when the agency over a course of years applies that statute in a certain way, that application should be given great weight when a court is called upon to determine the meaning of the statute. *Cf. Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496, 501; *Merchants National Bank of Boston* v.

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Commissioner, 320 U. S. 256, 260; *Textile Mills Securities Corp.* v. *Commissioner,* 314 U. S. 326, 338, 339.

Said Mr. Justice Holmes in *Bleistein* v. *Donaldson Lithographing Co.,* 188 U. S. 239, at 251; (in 1903 before the 1909 Copyright Law):

> "A picture is none the less a picture, and none the less a subject of copyright, that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazine as they are, they may be used to advertise the circus."

See, also, *Pellegrini* v. *Allegrini,* 2 F. (2d) 610; *Jones Bros. Co.* v. *Underkoffler,* 16 F. Supp. 729. Would not Mr. Justice Holmes, in the instant case, say that a statue is just as much a work of art when used to support a lamp as when it is displayed in an art gallery?

Consider Rodin's celebrated statue, "The Thinker." No one can deny that it is a "work of art" by any definition of the term. Yet it is a matter of common knowledge that this work can—and has, been used in book ends. Under the decision below, the book end form cannot be covered by a copyright of the statue form. We hardly think Congress intended this extreme and harsh result. The same observations might be made of many of the works of the great Benvenuto Cellini which had, potentially at least, utilitarian aspects.

[fol. 48] We now proceed to a discussion of certain of the decided cases which seem to be most closely in point. Defendants rely heavily on *Stein* v. *Expert Lamp Co.,* 96 F. Supp. 97, affirmed 188 F. (2d) 611, certiorari denied 342 U. S. 829. The opinions of District Judge LaBuy in the District Court in this case and Circuit Judge Kerner in the Court of Appeals each cover less than two printed pages. In Judge LaBuy's opinion he states (96 F. Supp. at page 97):

> "In plaintiff's reply brief it is asserted two models of the statuettes, one female and one male, were submitted to the copyright office and these models were in the 'form of lamp bases having the threaded mounting stub to receive a lamp socket.'

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Again, at page 98:

> "It would seem that plaintiff's submission of the statuettes with the lamp mounting stubs to the copyright office was evidence of the practical use to which they were intended to be put. Had it been merely the statuette, use of the statuette thereafter in any practical manner would not remove it from the scope of copyright protection. Having submitted the statuette as a lamp base, thereby limiting the use of the statuette, plaintiff cannot monopolize such use under the copyright statu(t)e."

And Judge Kerner remarked (188 F. (2d) at p. 612:)

> "It is true that plaintiffs have never manufactured and sold any statuettes such as they registered in the Copyright Office; they have, however, manufactured and sold electric table lamps which embody the design of the Copyrighted Statuettes, marked with a copyright notice, * * *."

[fol. 49] In the case before us, the statuettes were submitted to the Copyright Office in statuette form, not in the form of lamp bases. And some, though not many, of the copyrighted statuettes have been sold by plaintiffs as, and in the form of, statuettes. If this case be not distinguishable, we decline to follow it.

Stein v. *Benaderet,* 109 F. Supp. 364, followed the Expert case. District Judge Picard, however, made this pertinent observation (109 F. Supp. at page 365):

> "When the *Stein* v. *Expert Lamp Co., supra,* opinion was first published by Judge LaBuy in the district court it was opened to objection that the court had misunderstood the facts; that he was under the impression that when the statuettes were presented to the Copyright Office they displayed wires and sockets attached thereto so that it was apparent right from the beginning that they were to be used as lamp bases. However, this mistake was rectified before the matter reached the court of appeals after plaintiffs had directed the district court's attention to his alleged error and who then ruled that it was immaterial whether the article copy-

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righted had wires or sockets since it was obviously intended to be used for a lamp base."

In *Stein* v. *Rosenthal,* 103 F. Supp. 227, District Judge Tolin refused to follow the Expert case. He pointed out (103 F. Supp. at page 229):

> "The photographs of the statuettes deposited with the Copyright Office, as part of the claimed copyright in a reproduction of a work of art, are photographs of mere statues alone without electrical assemblies, lamp shades, lamp mounting stubs or any other addition to the purely artistic sculpture. Insofar as the copyright [fol. 50] registration shows, the several works registered are statues only. There is no suggestion in any of the several claims to copyright of any claim except the form of the figures. There are no mechanical or utilitarian aspects to the statues. None of the claims to copyright suggest any utilitarian use and if adaptability to such a purpose were to be sought solely from examination of the copyrighted material, the result would be negative."

And again (103 F. Supp. at page 230), he stated:

> "The point, insofar as this case is concerned, is simply that the copyrighted material is in itself non-utilitarian and non-mechanical. Protection is not dissipated by taking an unadulterated object of art as copyrighted and integrating it into commercially valuable merchandise. The appropriateness of copyright registration is determined by the character of the registered work of art as registered and not by the ability, intent or hope of the registrant to use it as a dress for a utilitarian object. Copyright protection is not reserved exclusively to proprietors who do not intend to earn money by commercialization of their art."

Also (103 F. Supp. at page 231), Judge Tolin remarked:

> "Having qualified for registration by reason of its purely artistic character, the question presented is whether an intent on the part of the claimant to copy such protected sculpture in such a way as to artistically

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enhance some separate and utilitarian article of manufacture destroys the right to copyright. The argument that this is so is but another vehicle to carry defendants' philosophy that if the artist intends to profit by [fol. 51] his creation he cannot acquire protection. To uphold this argument would be to require the Judicial inquiry to plumb the mind of every copyright proprietor and determine his plans and intentions as of the time of registration. This impossibility is not contemplated by the Statute."

We greatly prefer the reasoning here to that in the Expert case. It is quite clear that the District Judge in our case relied heavily on the Expert case and found "unconvincing the District Court's reasoning" in the Rosenthal case.

For Law Review notes taking exception to the Expert case, see 27 Indiana L. J. 130; 21 George Washington L. Rev. 353; 66 Harvard L. Rev. 877. We append a brief extract from each of these notes:

"This language indicates the purpose of the regulations to be an extension of copyright registration to all works of artistic craftsmanship even though the work may be embodied in an article that is essentially utilitarian rather than aesthetic in purpose." 27 Indiana L. J. 131.

"It would appear, then, from the decisions reached in the foregoing cases, that it does not matter to what subsequent use the copyrighted article is to be put, so long as the article, as submitted to the Copyright Office, is purely and simply a work of art." 21 Geo. Wash. L. Rev. 359.

"The argument that useful articles purporting to be works of art should be excluded from copyright because they may qualify for a design patent is not convincing." 66 Harv. L. Rev. 882.

See, also, Derenberg, "Copyright Law," 1948 Annual Sur- [fol. 52] vey of American Law, 777; Weil, "Copyright Law," 625; Umbreit, "A Consideration of Copyright Law, 87 Univ. of Pa. L. Rev. 932.

King Features Syndicate v. *Fleisher,* 299 Fed. 533, involved an issue somewhat similar to that of the instant case.

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There the "Barney Google and Spark Plug" cartoons were copyrighted. These copyrights were based on sketches deposited in the Copyright Office. The defendants copied the sketches in a three-dimensional doll form. The Circuit Court of Appeals squarely rejected the argument that execution of the art in a different form avoided infringement.

King Features Syndicate v. *Fleisher* was followed a decade later by *Fleisher* v. *Freundlich,* 73 F. (2d) 276. Here the Court held that a doll in the form of "Betty Boop" infringed the Betty Boop cartoons which were copyrighted as works of art. In *Fleisher Studios* v. *Ralph A. Freundlich, Inc.,* the copyright proprietor, through a licensee, distributed thousands of toys and dolls like those accused as infringements. This did not alter the relief granted since the doll copies in each instance embodied the artistic conception of "Betty Boop." In *Hill* v. *Whalen & Martell,* 220 Fed. 359, a dramatic performance using actors dressed like "Mutt" and "Jeff" was held to infringe the copyrighted "Mutt and Jeff" cartoons. These cases differed from the instant case in that there the copyrightee did not use the copyrighted material in a form different from the form under which the material was copyrighted. In our case, the material was copyrighted as statuettes, but was afterwards embodied by the copyrightee in a lamp base. Nor did the plaintiffs here create any fictional characters and associate them by name, such as "Barney Google" or "Betty Boop," which became well known to the public.

We are not impressed by the contention of counsel for defendants that the plaintiffs have here misused their copy- [fol. 53] rights and should on that ground be denied relief. *Cf. Morton Salt Co.* v. *Suppiger Co.,* 314 U. S. 488; *E. I. Horsman & Aetna Doll Co.* v. *Kaufman,* 286 Fed. 372, cert. den. 261 U. S. 615. The equities here, we think, lie with the plaintiffs, not with the defendants, who deliberately and meticulously copied the copyrighted statuettes by incorporating them into lamp bases.

It is strenuously contended by plaintiffs, and by the Government in its brief as *amicus curiae,* that the Copyright Statute and the Design Patent Statute are overlapping—in other words, that there is a field in which an applicant, at his option, could secure either a copyright or a design patent. This is vigorously denied by defendants. We do not

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think it necessary, in order to decide the case before us, to pass upon this important question.

All that we hold, and all that we need hold, is that the copyrights of the statuettes granted to plaintiffs were valid, even though plaintiffs intended primarily to use these statuettes in the form of lamp bases and did so use them, and that these copyrights were clearly infringed by defendants, who minutely copied these statuettes in the form of bases for lamps. Plaintiffs are, accordingly, entitled to the appropriate forms of relief usually granted in such cases.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

[fol. 54] DECREE—Filed and Entered May 19, 1953

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6572

BENJAMIN STEIN AND RENA STEIN, doing business as REGLOR OF CALIFORNIA, Appellants,

vs.

EMANUEL L. MAZER AND WILLIAM ENDICTER, doing business as JUNE LAMP MANUFACTURING COMPANY, Appellees.

Appeal from the United States District Court for the District of Maryland

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore,

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for further proceedings not inconsistent with the opinion of the Court filed herein.

John J. Parker, Chief Judge, Fourth Circuit. Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

June 9, 1953, petition of appellees for stay of mandate filed.

[fol. 55] Order Staying Mandate—Filed and entered June 9, 1953

(Style of Court and Title Omitted)

Upon the application of the Appellees, by their counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the said Appellees in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 40 days from this date.

June 9th, 1953.

John J. Parker, Chief Judge, Fourth Circuit.

Stipulation

In the Supreme Court of the United States

October Term, 1953

No. —

Emanuel L. Mazer and William Endicter, doing business as June Lamp Manufacturing Company, Petitioners,

vs.

Benjamin Stein and Rena Stein, doing business as Reglor of California, Respondents.

It is stipulated and agreed by and between counsel for the respective parties hereto, that for the purpose of the

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petition for writ of certiorari, the printed record may consist of the following:

1. Appendix to brief of appellants in the United States Court of Appeals for the Fourth Circuit.

[fol. 56] 2. Appendix to brief of appellees in the United States Court of Appeals for the Fourth Circuit.

3. The proceedings had before the United States Court of Appeals for the Fourth Circuit.

4. This stipulation.

It is further stipulated and agreed that the petitioners will cause the Clerk of the United States Court of Appeals for the Fourth Circuit to certify and file with the Clerk of the Supreme Court of the United States the complete record on appeal; and that, in the event the petition for writ of certiorari is granted, the printed record shall consist of the printed record on the petition for writ of certiorari and such additional portions of the certified record as the parties may designate.

It is further stipulated and agreed that the parties hereto may refer in the petition for writ of certiorari and briefs to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

June 12, 1953.

Max R. Kraus, Counsel for Petitioners; Will Freeman, George Frost, Counsel for Respondents.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 217] SUPREME COURT OF THE UNITED STATES

No. 228, October Term, 1953

EMANUEL L. MAZER and WILLIAM ENDICTER, doing business as JUNE LAMP MANUFACTURING COMPANY, Petitioners,

vs.

BENJAMIN STEIN and RENA STEIN, doing business as REGLOR OF CALIFORNIA

ORDER ALLOWING CERTIORARI—Filed October 12, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The Solicitor General is invited to file a brief setting forth, along with other matters he deems pertinent, the views of the Copyright Office and a statement of its relevant practice.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

No. 228

EMANUEL L. MAZER AND WILLIAM ENDICTER, DOING BUSINESS AS JUNE LAMP MANUFACTURING COMPANY,

Petitioners,

vs.

BENJAMIN STEIN AND RENA STEIN, DOING BUSINESS AS REGLOR OF CALIFORNIA

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MAX R. KRAUS,
33 N. LaSalle St.,
Chicago, Ill.

ROBERT L. KAHN,
105 W. Adams St.,
Chicago, Ill.
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

No.

EMANUEL L. MAZER AND WILLIAM ENDICTER, DOING BUSINESS AS JUNE LAMP MANUFACTURING COMPANY,

Petitioners,

VS.

BENJAMIN STEIN AND RENA STEIN, DOING BUSINESS AS REGLOR OF CALIFORNIA

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Emanuel L. Mazer and William Endicter, d/b/a June Lamp Manufacturing Co. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered

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in the above entitled case on May 19, 1953. The transcript of the record of the case, including the proceedings in the Court of Appeals, is furnished forthwith in accordance with Rule 38 of the Rules of this Court.

OPINIONS BELOW.

The opinion of the trial court of the United States District Court in Baltimore, Maryland appears in the record page 2. It is reported in 111 F. Supp. 359. The opinion of the Court of Appeals reversing the trial court appears in the record page 35. It is reported in 97 U. S. P. Q. 310.

The prior opinion of the Court of Appeals of the Seventh Circuit with which the opinion of the Court of Appeals of the Fourth Circuit is in direct conflict is *Stein* v. *Expert,* reported in 188 F. (2) 611, (1951), Certiorari denied 342 U. S. 829. The opinion of the District Court in Chicago, Illinois, which was affirmed by the Court of Appeals of the Seventh Circuit is reported in 96 Fed. Supp. 97.

The same issues were presented and decided in the District Court in Detroit, Michigan in the Sixth Circuit in *Stein* v. *Benaderet,* reported in 109 Fed. Supp. 364 (1952). An appeal to the Court of Appeals of the Sixth Circuit is presently pending.

The same issues were presented and decided by the District Court in Los Angeles, California in the Ninth Circuit in *Stein* v. *Rosenthal,* 103 F. S. 227 (1952). On appeal, the defendants admitted the validity of the copyrights involved and the remaining issues were recently affirmed, June 26, 1953. 98 U.S.P.Q. 180.

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JURISDICTION.

Jurisdiction is based upon a direct conflict in the judgments of the Courts of Appeals of the Fourth Circuit and the Seventh Circuit.

Jurisdiction is also based upon the fact that in Circuits other than the Fourth and Seventh, and particularly in the Sixth and in the Ninth Circuit, litigation involving the same subject matter and the interpretation of the identical Federal Statutes is involved. The District Court in the Sixth Circuit followed and adopted the decision of the Court of Appeals of the Seventh Circuit. The District Court and the Court of Appeals of the Ninth Circuit rejected it. The uncertainty existing throughout the United States, both in the Bench and the Bar has been reflected in legal commentaries and articles, such as, 66 Harvard L. Rev. 882; 27 Indiana L. J. 131 and 21 George Washington L. Rev. 359.

The importance of the issues here to the Copyright Office of the Library of Congress is pointed out in a brief filed by the Department of Justice as amicus curiae for the Fourth Circuit Court of Appeals.

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QUESTION PRESENTED.

The Court of Appeals for the Seventh Circuit has construed the relative scope of the Copyright and Design Patent Laws as follows: *Stein* v. *Expert,* 188 F. (2) 611, 612.

> "We have examined and considered all the cases cited but are not persuaded that a design of an electrict lamp may be protected as a monopoly by means of a copyright registration, registered without examination as to originality, novelty or inventiveness."

The Court of Appeals for the Fourth Circuit has considered the relative scopes of the Copyright and Design Patent Laws and has stated (R. 49):

> "All that we hold, and all that we need hold, is that the copyrights of the statuettes granted to plaintiffs were valid, even though plaintiffs intended primarily to use the statuettes in the form of lamp bases and did so use them."

The Attorney General of the United States considered the issues important enough to file a brief as amicus curiae before the Court of Appeals for the Fourth Circuit and in the brief stated:

(Page 1):

> "This proceeding raises important questions under the Copyright Law and the Rules and Regulations of the Copyright Office.
>
> * * *
>
> (Page 4):
>
> Accordingly, the Register of Copyrights is critically interested in the question raised by these proceedings. The resolution of that question has an important bearing on the operation of the Copyright Office and the effectuation of the objective of the Copyright Law."

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The actual question presented is—Can statuettes be protected in the United States by copyright when the copyright applicant intended primarily to use the statuettes in the form of lamp bases to be made and sold in quantity and carried the intentions into effect?

Stripped down to its essentials, the question presented is: **Can a lamp manufacturer copyright his lamp bases?**

STATUTES AND REGULATIONS INVOLVED.

The Statutes involved herein are the Copyright Statutes and the Design Patent Statutes. The Copyright Regulations are also involved. The statutes and regulations are herewith tabulated:

DESIGN PATENT STATUTES.

1842—(5 Stat. 543) (Sec. 3)—page 38 of Record.

1870—(16 Stat. 198) (Sec. 71)—page 38-39 of Record.

1902—(32 Stat. 193)—page 39 of Record.

1952—(35 U.S.C. 171, 66 Stat. 792)—page 39 of Record.

COPYRIGHT STATUTES.

1870—(16 Stat. 198, 212) (Sec. 86) Page 39 of Record.

1874—(Sec. 4952, Revised Statutes)—page 40 of Record.

1909—(35 Stat. 1076 Sec. 5)—Page 40 of Record.

1948—17 U.S.C. 5, 61 Stat. 652—Page 40 of Record.

COPYRIGHT REGULATIONS.

1926—17 U.S.C.A. West Bound Vol. p. 182—page 40 of Record.

1950—U.S.C.A. 1, (1952) p. 332-333—page 41 of Record.

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STATEMENT.

The respondents herein as plaintiffs in 1950 filed a suit in the United States District Court in Chicago, alleging infringement of certain copyrights on statuettes. These statuettes were embodied by respondents as bases in electrict table lamps, said lamps being manufactured and sold by respondents in quantity throughout the United States. The District Court in Chicago entered a judgment that the copyrights were invalid and that the subject matter of the copyrights should have been subjects for applications for design patents in the United States Patent Office. The opinion of the District Court was reported in 96 Fed. Supp. 97 (1951).

Respondents appealed to the Court of Appeals for the Seventh Circuit and the judgment of the District Court was affirmed. The opinion is reported in 188 F. (2) 611 (1951). Respondents petitioned for a writ of certiorari, which was denied 342 U.S. 629.

The respondents filed suit on the same copyrights or similar copyrights against other defendants in Los Angeles, Detroit and Baltimore. The identical issues were involved in each of these cases. The second case tried was in the United States District Court in Los Angeles, California. The District Court decided in favor of respondents holding the copyrights valid and infringed. *Stein* v. *Rosenthal*, 103 F.S. 227 (1952).

Respondent's third case was tried in the District Court in Detroit, Michigan. This involved the identical copyrights as in the California case and the charge of infringement was also predicated on electric table lamps manufactured by the defendant. The District Court in Detroit, after a consideration of the opinions of the District Courts

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in Chicago and Los Angeles, and the Court of Appeals of the Seventh Circuit, rendered its opinion and judgment and agreed with the opinion and judgment of the Court of Appeals of the Seventh Circuit in *Stein* v. *Expert, supra,* and specifically rejected the decision in the California case of *Stein* v. *Rosenthal, supra.* The complaint was dismissed. *Stein* v. *Benaderet,* 109 F.S. 364 (1952). This third case is now on appeal by Respondents.

Respondents fourth case was tried in the United States District Court in Baltimore, Maryland, which is the trial court in the case at bar. The suit was based upon similar copyrights, the alleged infringements also being electric table lamps. The trial court below (Judge Coleman), after considering the opinions and decisions of the Courts in the Seventh Circuit and of the District Court in Los Angeles, California, rendered its opinion and judgment in accordance with the opinion and judgment of the Court of Appeals of the Seventh Circuit and specifically rejected the reasoning and decision in the California case. The opinion of the Baltimore District Court, in favor of the Petitioner appears in the record pages 2-11 and is reported in 111 Fed. Supp. 359.

Respondents appealed to the Court of Appeals for the Fourth Circuit and a few days prior to the hearing by the Court of Appeals, The Attorney General of the United States, through the Solicitor for the Library of Congress, filed a brief as amicus curiae and supported the position of respondents. The Court of Appeals for the Fourth Circuit reversed the trial court below and held the copyrights valid and infringed. In its opinion, the Court of Appeals for the Fourth Circuit took direct issue with the Court of Appeals for the Seventh Circuit. The opinion appears in the record pages 35-49.

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Subsequent to the opinion in the Fourth Circuit, the Ninth Circuit Court of Appeals on June 26, 1953, affirmed the District Court in the Los Angeles case, 98 U.S.P.Q. 180.

In every one of the above cases, the respondents herein have been the plaintiffs and have initiated the litigation in various parts of the United States. The defendants have been different in the different circuits, but, with the exception of the California case, all the cases have been tried and defended by the same principal counsel herein.

ERRORS TO BE URGED.

1. In holding that a copyright on a statuette is valid even though the applicant for the copyright intended primarily to use the statuettes in the form of lamp bases and did so use them.

2. In failing to hold that a lamp base must be the subject of an application for a design patent rather than an application for copyright in case an applicant desires to secure a Federal monopoly thereon under present Statutes.

3. In holding that a lamp manufacturer may protect the design of an electric table lamp which he intends to and does produce in substantial quantities for sale and obtain a monopoly on the design of such a lamp base under the Copyright Laws rather than under the Design Patent Laws.

4. In failing to hold that a lamp manufacturer who designed a lamp base intending it to be primarily sold as a lamp, and whose first sales were as lamps did not comply with the requirements of the Copyright Act by submitting a statuette as a work of art and relying on the

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date of sale of such a lamp as the publication date of the work of art.

5. In reversing the trial court in the Baltimore case and failing to follow the decision of the Court of Appeals in *Stein* v. *Expert,* 188 F. (2) 611; certiorari denied 342 U.S. 629.

REASONS FOR GRANTING THE WRIT.

The direct conflict in decisions upon identical issues between the Courts of Appeals for the Fourth and Seventh Circuits respectively, and the tendency of District Courts in other parts of the Country to aline themselves in their opinions with either the Court of Appeals for the Fourth Circuit or for the Seventh Circuit creates a situation where the scope and interpretation of the Federal Statutes relating to copyrights and design patents are in fundamental dispute. The Department of Justice in its brief as amicus curiae has indicated that the questions involved herein are of fundamental importance to the operation of the Copyright Office of the Library of Congress and to the protection of the rights purported to be granted under the Copyright Statutes by certificates of Copyright. Correlatively the scope and interpretation of the design patent laws as administered by the United States Patent Office is brought into question. Both the Copyright and Patent Offices are presently granting monopolies on table lamps among other things.

Underlying the philosophy of the decision in the Seventh Circuit Court of Appeals is the thesis that copyright laws and design patent laws do not overlap and that the monopoly claimed by respondents herein under the provisions of the Copyright Laws should be subject to the

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scrutiny and care exercised by the United States Patent Office in acting upon applications for design patents. The Court of Appeals of the Seventh Circuit felt that a lamp manufacturer who designed artistic bases for electric table lamps and sold them as electric lamps could not create his own monopoly by the pro forma issue of certificates of copyright. These are perfunctorily issued, without examination by the Copyright Office of the Library of Congress, within ten days after filing of same for a period of 28 years upon the payment of a $4.00 fee. The copyright carries the privilege of renewal for a slight government fee for an additional 28 years. The Court of Appeals felt that the public interest required that such protection could only be given by the United States Patent Office under design patents after the subject matter has been examined as to originality, ornamentation, and invention for a maximum period of 14 years.

The Patent Office has been issuing design patents on such since 1842. The Copyright Office is a newcomer in this field.

The philosophy underlying the opinion of the Court of Appeals for the Fourth Circuit is that copyrights for electric table lamps to be made and sold in quantity are valid. The Court of Appeals for the Fourth Circuit saw no necessity for determining whether there was in fact any conflict or overlap between the Copyright and Design Patent Laws, and that the copyrights were valid and infringed. The self-service effect of the Copyright procedure was not considered to be detrimental to the public interest.

The Attorney General, through the Solicitor for the Library of Congress—no argument on behalf of the Patent Office was presented—argued that copyright protec-

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tion was different from design patent protection; that the two laws did overlap and that an applicant could go either to the Copyright Office or to the Patent Office.

The Government brief states (page 3):

> "The court below, (trial court) in accord with the Court of Appeals for the Seventh Circuit, *Stein* v. *Expert Lamp Co.*, 188 F. 2d 611, and the District Court for the Eastern District of Michigan, *Stein* v. *Benaderet,* 109 F. Supp. 364, but in *conflict* with the District Court for the Southern District of California, *Stein* v. *Rosenthal,* 103 F. Supp. 227, has held that a work of art which may be, and is, utilized for some practical use may be protected only by design patent and not by copyright."

The Copyright Office has expanded the field of copyrights and issues copyrights on such items as follows:

From catalog of copyright entries:

Vol. 1, parts 7-11A Number 2 (July-Dec. 1947)
"Works of Art"

Design for button—GU 6636 (p. 89)
Pin up pig bank—GP 6079 (p. 90)
Design for glove bag—GP 6348 (p. 90)
Leather Tooling Design—GP 6742 (p. 91)
Design for bed spread—GP 6155 (p. 91)
Design for puppet stage and packing box combined—GU 7061—(p. 91)
Design for sewing selector—GU 6182—(p. 91)
Design for collapsible lamp shade—GU 5903—(p. 93)
Design for cemetery monument—GP 6831—(p. 96)
Doll design—GU 6819—(p. 96)
Bottle opener (metal figurine)—GP 5990—(p. 97)
Models for ash tray—GU 5945—(p. 97)
Designs for lamps—GU 6563—(p. 98)

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Design for costume jewelry—GU 7148 (p. 98)
Design for hat and for container—GU 6834 (p. 98)
Design for game board—GP 6418 (p. 99)
Design for metal compact—GU 6709 (p. 100)
Model for child's purse—GU 5981 (p. 102)
Design for a belt buckle—GP 5923 (p. 105)
Ladies purse, billfolds design—GU 6164 (p. 105)

The book of design patents in evidence as Defendant's Ex. 2 illustrates the subject matter of design patents issued by the U. S. Patent Office. Since 1842 the U. S. Patent Office has issued a total of approximately 170,000 design patents.

With the conflict of decisions now present, a copyright owner holding a design for a product, may have it declared invalid in the Seventh Circuit and valid in the Fourth and Ninth Circuits. The Court of Appeals in the Sixth Circuit has yet to be heard from.

Commentators in various law periodicals have recognized that there is a field where copyright and design patent laws appear to be contiguous, with some commentators alleging and others denying that there is an overlap. All agree, however, that confusion is rampant in this field.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
MAX R. KRAUS,
ROBET L. KAHN,
Counsel for Petitioners.

Date July 30, 1953

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953

No. 228

EMANUEL L. MAZER AND WILLIAM ENDICTER, DOING BUSINESS AS JUNE LAMP MANUFACTURING COMPANY,

Petitioners,

VS.

BENJAMIN STEIN AND RENA STEIN, DOING BUSINESS AS REGLOR OF CALIFORNIA

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Brief for the Petitioners

MAX R. KRAUS,
33 N. LaSalle St.,
Chicago, Ill.

ROBERT L. KAHN,
105 W. Adams St.,
Chicago, Ill.

Counsel for Petitioners.

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Brief for the Petitioners

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

The opinion of the trial court of the United States District Court in Baltimore, Maryland, appears in the record, pages 57-66. It is reported in 111 F. Supp. 359. The opinion of the Court of Appeals reversing the trial court appears in the record pages 70-84. It is reported in 204 F.S. (2) 472.

The prior opinion of the Court of Appeals of the Seventh Circuit with which the opinion of the Court of Appeals of the Fourth Circuit is in direct conflict is *Stein* v. *Expert,* reported in 188 F. (2) 611, (1951), *Certiorari* denied 342 U. S. 829. The opinion of the District Court in Chicago, Illinois, which was affirmed by the Court of

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Appeals of the Seventh Circuit is reported in 96 Fed. Supp. 97.

The same issues were presented and decided in the District Court in Detroit, Michigan in the Sixth Circuit in *Stein* v. *Benaderet,* reported in 109 Fed. Supp. 364 (1952). An appeal to the Court of Appeals of the Sixth Circuit is presently pending.

The same issues were presented and decided by the District Court in Los Angeles, California in the Ninth Circuit in *Stein* v. *Rosenthal,* 103 F. S. 227 (1952). On appeal, the defendants admitted the validity of the copyrights involved and the remaining issues were recently affirmed, June 26, 1953. 205 F. (2) 633.

JURISDICTION.

Jurisdiction is based upon a direct conflict in the judgments of the Courts of Appeals of the Fourth Circuit and the Seventh Circuit.

Jurisdiction is also based upon the fact that in Circuits other than the Fourth and Seventh, and particularly in the Sixth and in the Ninth Circuit, there is litigation involving the same subject matter and the interpretation of the identical Federal Statutes. The District Court in the Sixth Circuit followed and adopted the decision of the Court of Appeals of the Seventh Circuit. The District Court and the Court of Appeals of the Ninth Circuit rejected it.

A petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit was filed August 3, 1953 and was granted October 12, 1953. The order granting the writ invited the Solicitor General of the United States to file a brief "setting forth, along with other matters he deems pertinent, the views of the Copyright Office and a statement of its relevant practice." (R. 87).

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QUESTION PRESENTED.

The actual question presented is—Can statuettes be protected in the United States by copyright when the copyright applicant intended primarily to use the statuettes in the form of lamp bases to be made and sold in quantity and carried the intentions into effect?

Stripped down to its essentials, the question presented is:

CAN A LAMP MANUFACTURER COPYRIGHT HIS LAMP BASES?

U. S. Statutes Involved.

Design Patent Statutes.

1842—5 Stat. 543, Sec. 3.

1870—16 Stat. 198, Sec. 71.

1902—32 Stat. 193.

1952—35 U.S.C. 171; 66 Stat. 792.

Copyright Statutes.

1790—Copyright Act of May, 1790.

1870—16 Stat. 198, 212, Sections 86, 100.

1874—Sec. 4952, Revised Statutes.

1909—35 Stat. 1076 Sections 5, 25b.

1947—17 U.S.C. Sections 1(a), 1(b), 5, 101(b) (First)

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1926 (re-enactment of 1909)
17 U.S.C.A. West-Bound vol. 1 page 182

1949 (also called 1950 and presently in force)
Title 17 U.S.C.A. 1 (1952) Sections 202.8 and 202.9 pp. 332-333.

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STATEMENT OF FACTS.

The petitioners and respondents are the defendants and plaintiffs respectively in the trial court below. The suit was based on defendants' manufacture and sale of electric table lamps, no statues being involved. (R. 57)

The respondents herein as plaintiffs in 1950 filed a suit in the United States District Court in Chicago, alleging infringement of certain copyrights on statuettes. These statuettes were embodied by respondents as bases in electric table lamps, said lamps being manufactured and sold by respondents in quantity throughout the United States. The District Court in Chicago entered a judgment that the copyrights were invalid and that the subject matter of the copyrights should have been subjects for applications for design patents in the United States Patent Office. The opinion of the District Court was reported in 96 Fed. Supp. 97 (1951), *Stein* v. *Expert.*

Respondents appealed to the Court of Appeals for the Seventh Circuit and the judgment of the District Court was affirmed. The opinion is reported in 188 F. (2) 611 (1951). Respondents petitioned for a writ of certiorari, which was denied 342 U.S. 629, *Stein* v. *Expert.*

The respondents filed suit on the same copyrights or similar copyrights against other defendants in Los Angeles, Detroit and Baltimore. The identical issues were involved in each of these cases. The second case tried was in the United States District Court in Los Angeles, California. The District Court decided in favor of respondents holding the copyrights valid and infringed. *Stein* v. *Rosenthal,* 103 F.S. 227 (1952).

Respondent's third case was tried in the District Court in Detroit, Michigan. This involved the identical copyrights as in the California case and the charge of infringe-

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ment was also predicated on electric table lamps manufactured by the defendant. The District Court in Detroit, after a consideration of the opinions of the District Courts in Chicago and Los Angeles, and the Court of Appeals of the Seventh Circuit, rendered its opinion and judgment and agreed with the opinion and judgment of the Court of Appeals of the Seventh Circuit in *Stein* v. *Expert, supra,* and specifically rejected the decision in the California case of *Stein* v. *Rosenthal, supra.* The complaint was dismissed. *Stein* v. *Benaderet,* 109 F.S. 364 (1952). This third case is now on appeal by Respondents.

Respondents fourth case was tried in the United States District Court in Baltimore, Maryland, which is the trial court in the case at bar. The suit was based upon similar copyrights, the alleged infringements also being electric table lamps. The trial court below (Judge Coleman), after considering the opinions and decisions of the Courts in the Seventh Circuit and of the District Court in Los Angeles, California, rendered its opinion and judgment in accordance with the opinion and judgment of the Court of Appeals of the Seventh Circuit and specifically rejected the reasoning and decision in the California case. The opinion of the Baltimore District Court, in favor of the Petitioner appears in the record pages 57-66 and is reported in 111 Fed. Supp. 359, *Stein* v. *Mazer.*

Respondents appealed to the Court of Appeals for the Fourth Circuit and a few days prior to the hearing by the Court of Appeals, The Attorney General of the United States, through the Solicitor for the Library of Congress, filed a brief as amicus curiae and supported the position of respondents. The Court of Appeals for the Fourth Circuit reversed the trial court below and held the copyrights valid and infringed. In its opinion, the Court of Appeals for the Fourth Circuit took direct issue with the

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Court of Appeals for the Seventh Circuit. The opinion appears in the record pages 70-84 and is reported in 204 F. (2) 472.

Subsequent to the opinion in the Fourth Circuit, the Ninth Circuit Court of Appeals on June 26, 1953, affirmed the District Court in the Los Angeles case, 205 F. (2) 633.

The copyrights involved in the case at bar were first claimed by respondents in connection with sales of complete electric table lamps bearing alleged copyright notices. (R. 8-10—Interrogatories; R. 10-14—Answers; R. 15—Stipulation.) The claims to copyright were registered (R. 31-37) by respondents in the Copyright Office by filing applications accompanied by statuettes or copies of statuettes (R. 20-21), which statuettes were embodied as lamp bases in the table lamps as sold.

Complete table lamps whose bases were the statuettes as bases were made and sold in large numbers (R. 10-14) throughout the United States, such table lamps carrying copyright notices.

The statuettes were designed for use as bases in table lamps. Only ten statuettes alone were sold compared to 7,440 complete lamps. (Chart on page 35 of brief, based upon Record.)

ERRORS TO BE URGED.

1. In holding that a copyright on a statuette is valid even though the applicant for the copyright intended primarily to use the statuettes in the form of lamp bases and did so use them.

2. In failing to hold that a lamp base must be the subject of an application for a design patent rather than an application for copyright in case an applicant desires

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to secure a Federal monopoly thereon under present statutes.

3. In holding that a lamp manufacturer may protect the design of an electric table lamp which he intends to and does produce in substantial quantities for sale and obtain a monopoly on the design of such a lamp base under the copyright laws rather than under the design patent laws.

4. In failing to hold that a lamp manufacturer who designed a lamp base intending it to be primarily sold as a lamp, and whose first sales were as lamps did not comply with the requirements of the copyright law by submitting a statuette as a work of art and relying on the date of sale of such a lamp as the publication date of the work of art.

5. In reversing the trial court in the *Baltimore* case and failing to follow the decision of the Court of Appeals in *Stein* v. *Expert,* 188 F. (2) 611; certiorari denied 342 U.S. 629.

SUMMARY OF ARGUMENT.

Fundamental considerations of law and economics require a critical examination of every monopoly purported to be created under the copyright or patent laws. A challenge to the legality of such a monopoly is a matter of right and should be encouraged to a reasonable degree.

Respondent manufacturers of electric table lamps had statues designed to be used as bases in a line of electric lamps manufactured and sold throughout the United States. The publication or sale of the items to be copyrighted as required by copyright law and regulations was accomplished here with complete electric lamps, while the

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copyright registration for filing the copyright was accompanied with the statue in each instance. The respondents intended, as evidenced by their acts, to avoid the examination procedure in the Patent Office in connection with design patent applications and instead, took advantage of the copyright law to register a claim to copyright on an article of manufacture, which included as a part thereof an alleged work of art.

The Constitution is the source from which copyright and patent legislation stems. The copyright laws and patent laws enacted at various times in the history of the United States, derived from a common constitutional source, must be interpreted as complementary and not overlapping or conflicting. The very nature of government demands that laws administered by separate governmental bureaus be thus construed to prevent duplication of service rendered to the public and conflict between such separate government bureaus.

The copyright and patent grants constitute monopolies and represent the consideration or reward from the public to the creator or inventor, as the case may be. The primary consideration, however, is the disclosure by the creator or inventor to the public and because this is the primary consideration, it is incompatible with the public interest that a copyright claimant or applicant for patent be given the right to select either of these two monopolies at will. The copyright monopoly and patent monopoly in practice work out to similar ends and provide generally similar protection and the differences are due to the 28-year duration of the copyright monopoly, coupled with punitive damage provisions as distinguished from the maximum 14-year monopoly and reasonable damage provisions in the patent monopoly.

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Fundamentally and historically, the Copyright Office is the repository of what each claimant considers to be a cultural treasure, whereas the Patent Office is the repository of what each applicant considers to be evidence of the advance in industrial and technological fields. In 1842, design patent protection was first made possible. Up to 1870, copyright protection which had been provided by previous enactments was confined solely to writings. In 1870, patent and copyright legislation were consolidated and for the first time, copyright protection was enlarged to include "works of fine art." Design patent protection had been and still continued to be directed toward the esthetic or artistic side of articles of manufacture.

A design patent is issued after a critical examination by the Patent Office to determine that the subject matter is both ornamental and original and has been invented by the applicant. The copyright monopoly is created by publication or sale (in those cases where the copyrighted work is to be published or sold) of the work with a copyright notice thereon and the copyright claim is registered in the Copyright Office of the Library of Congress by depositing a sample or best edition of the copyrighted work, together with a simple application and government fee.

In 1902 and 1909, the Design and Copyright Acts respectively were modernized and streamlined. Both of the acts, however, retained their previous coverage as regards "works of fine art" going to the Copyright Office and "works of art" constituting articles of manufacture going to the Patent Office. The 1909 Copyright Act omitted *fine* from "works of fine art", but the history of the legislation together with the interpretation by the Copyright Office from 1909 to 1949 indicates that the omission of *fine* was

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for the purpose of eliminating a superfluous word rather than changing or broadening the meaning of "works of fine art".

The present design patent law is substantially the same as the 1902 design patent law and covers "a new and ornamental design for an article of manufacture." The Patent Office has issued patents under previous design acts from 1842 up to date on articles of manufacture having artistic merit.

The expression "works of fine art" as used in the original Copyright Act of 1870 and effectively repeated in 1909, and in the present enactment, confines the field of copyright protection only to works of fine art. This has been defined by this Court as painting, original statuary and sculpture, and the definition and understanding of "works of fine art" requires that the work have artistic value only and be free of any practical utility. The conception of original work of fine art also precludes the mechanical duplication of the original form of the work of fine art and is in harmony with the fundamental conception of artists that the creation is unique. A work of fine art as Cellini's saltcellar has only a theoretical utility.

A fundamental objective of art is to make a creation for reaching and affecting the intellect and emotion of a person to sway such person. An artist when creating what he considers to be a work of fine art, puts his creation into physical form with no consideration of duplication in quantity. In many instances, an original work of fine art cannot be duplicated by mechanical means.

By asserting a claim to statutory copyright, the creator of a work of art asserts to the world that his creation is a masterpiece and a work of fine art and is not to be

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degraded by transforming the item to an article of manufacture.

The interpretation of the Copyright Office on "work of art" as used in the 1909 Act, carried forward in the 1947 Act, adhering to the traditional concept of the Copyright Office in registering claims for copyright of works of fine art only, is conclusive upon the respondents, upon the public generally, and upon the Copyright Office.

The attempt of the Copyright Office to enlarge its field of operations beyond works of fine art into the field of articles of manufacture, having some artistic appeal results in a clear encroachment upon the field of operation of the Patent Office and will result in undermining the operation of the Patent Office in administering design patent statutes.

The obvious advantages of copyright protection over design patent protection reflected in the certainty of creation of the copyright monopoly and the long duration, as well as the effective enforcement provisions incident to the copyright monopoly will result in a host of monopolies being created and will be conducive to a condition of utter chaos.

While the question of possible duplication or overlap of Copyright and Patent laws has been considered in a few isolated instances and by scholars such as Weil and DeWolf, the policy and regulations of the Copyright Office in confining its operations to "works of fine art" generally rendered such questions and discussions moot. However, the change in policy of the Copyright Office, reflected in its new regulations adopted in 1949, in expanding copyright protection to industrial design has engendered substantial litigation and has made the question of overlap an active issue.

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ARGUMENT.

Every Monopoly Should Be Critically Examined.

The position of the petitioners is based upon the most fundamental proposition in the field of legal economics—no monopoly restraining free competition should be tolerated except when clearly sanctioned by law. In the field of patents, both mechanical and design, a challenge to the legality of the alleged monopoly is regarded as a right, valuable in its tendency to protect the public interest, this in spite of the examination procedure in the United States Patent Office providing for protection of the public interest, however imperfect that may ultimately prove to be. In the field of copyrights, the registration procedure in the Copyright Office of the Library of Congress leaves the public interest completely unprotected. No examination is made by the Copyright Office. *Burrough-Giles Lithographic* v. *Sarony*, 111 U. S. 53; 59. The monopoly allegedly created under the copyright laws must therefore be examined with more than ordinary care.

The respondents are manufacturers of electric table lamps. A partner in the respondent firm designed a number of bases for their line of table lamps (R. 40B). These bases included statuettes. In order to obtain a monopoly on their lamp designs, the respondents took advantage of the copyright laws. Based upon the sale of a complete table lamp with notice of copyright thereon, respondents submitted with their copyright application a statuette alone and registered their self-created monopoly in the Copyright Office. For a $4.00 fee, plus a simple form filled in in duplicate and the postage on the application form (the copyright samples or pictures as the case may be are carried free

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(for 28 years plus a possible 28 year renewal)

of postage) the respondents registered a monopoly on a statuette as a work of art while actually exercising the monopoly on a complete article of manufacture having actual utility. The record here shows sales by respondents of 7,440 electric table lamps and 10 statuettes. The statuette sales occurred long after the first sales of the lamps. (Chart on page 35 of this brief.)

In *Stein* v. *Benaderet,* 109 F.S. 364 E. D. Mich. S. D. 1952, involving the same issues including all copyright registrations involved here and including the respondents as plaintiffs (the defendants were different) the District Court found that respondents manufactured and sold almost 20,000 table lamps and only 5 statuettes as copyrighted were sold. At that these 5 were sold to one person after some adverse comment on this state of affairs had been made in a decision by still another Court in a still different litigation instituted by respondents.

The respondents have taken different positions in this entire series of litigations throughout the United States. First, they have asserted that Copyright and Design Patent laws overlap and that the creator of a work of art can select as his reward the monopoly under one or the other laws. Second, they assert that the Copyright laws contemplate not simply works of fine art but works of art generally. Third, they assert that the artist applicant, one of the partners in a lamp manufacturing business, deserves the protection of the Copyright laws in spite of

(a) deliberately selecting copyright registration instead of submitting to examination in the Design Patent Division;

(b) making an electric table lamp and selling it under claim of copyright while submitting only the statuette part to the Copyright Office as a work of art.

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There is a fundamental reason why the copyright and design patent laws should be interpreted not to overlap.

The basis for and policy of the copyright and patent law is stated in Article I Section 8 of the Constitution.

> "The Congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

To carry out this general policy, the Congress has created the United States Patent Office and the Copyright Office in the Library of Congress. Each of these two bureaus fulfills its own peculiar function and, for the most part, there is no dispute as to the fundamentally different natures of these functions.

There is a field, however, wherein the functions of the Copyright Office and Patent Office are contiguous as contended by us, and overlapping as contended by the respondents. From the very nature of Government, however, it is submitted that no overlapping fields of operation for two separate Government bureaus should be found unless the statutes defining the functions of these bureaus can only be reasonably interpreted in a manner to support overlapping.

The contiguous fields relate to "works of art, models or designs for works of art" and "reproductions of a work of art" in the Copyright Act and "a new, original and ornamental design for an article of manufacture" in the Design Patent Statutes.

The pertinent portions of the Copyright Act must be interpreted not only in its own environment in the Copyright Act but in relation to the Design Patent Statutes.

The effect of the decision of the Court of Appeals of the Fourth Circuit is to give the lamp manufacturer here

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the privilege of selecting the Copyright or Design patent monopoly as a reward for disclosing to the Copyright Office a statuette as a work of art and disclosing and offering for sale to the public electric table lamps obviously having utility as well as ornamental value.

This makes a mockery of this Court's admonition in *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131.

> "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration."

The primary consideration of disclosure to the public in this instance assumes a dualism. To the Copyright Office the disclosure is a statuette as a work of art. To the public the disclosure is an article of manufacture in the form of an electric table lamp having utility and manufactured with impersonal, mechanical uniformity in numbers to satisfy public demand.

The Court of Appeals for the Seventh Circuit (*Stein* v. *Expert,* 188 F.(2) 611 - 1951) on the other hand denied the lamp manufacturer (respondents) this alternative privilege and held that the Design Patent statutes provided the proper basis for obtaining protection. This decision is in fundamental harmony with the reciprocal consideration basis for both patent and copyright laws as set forth in the Constitution.

The ease and certainty of the unilateral action, the longer term with automatic right of renewal, the nominal government fee, the more powerful rights created under copyright laws immediately raises the question why any one should choose the harder way under the Design Patent laws. Before alleging that monopoly rights may be created under one or other set of statutes, it is necessary to see if these statutes are not in fact mutually exclusive rather than overlapping.

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The fundamental philosophies underlying the pertinent portions of the copyright laws and design patent laws.

Prior to the adoption of the United States Constitutional Provision, Article I, Section 8, dealing with copyrights and patents, twelve of the original thirteen States had copyright laws which protected copyrights only on books, pamphlets, maps and charts. Delaware had no copyright laws. (Library of Congress Bulletin No. 3, Copyright Enactments 1782-1900).

The rights under the various State Copyright Laws were transferred from the States to the Federal Government.

The first Federal Copyright Act of May, 1790 was entitled

> "An Act for the encouragement of learning by securing the copies of maps, charts and books to the Authors, to Proprietors of such copies during the time therein mentioned."

Fine art was not protected at all. The first Section of this Act dealt with authors and proprietors of books, and used the words "print", "reprint", "publish" or "vend", in relation to books, maps and charts. Said words were used in the Copyright laws of the twelve States, and said words are likewise used in the present Copyright Act.

The Patent Act of 1790, 1 Statutes at Large, 109 entitled "An Act to promote the progress of useful Arts", (Walker on Patents, Deller's edition of 1937, vol. 1, page 514), contemplated only mechanical patents and did not provide for designs.

There was originally a wide gap between copyrights and patents. In 1842 the field of patent coverage was enlarged by legislation to provide design patent coverage to cater

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to the esthetic needs of business. Such patent coverage has been and still is drawn to include *ornamental* designs for articles of manufacture. It has consistently been held that the utilitarian aspects of an item are not to be considered in a design patent and design patent coverage has always been based upon the beauty of the article to be manufactured.

The copyright laws were enlarged in 1870 so that "paintings, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts" were included.

A tabulation of the pertinent parts of the various Copyright and Design Patent laws from 1842 to date is opposite the concluding page 46 and may be unfolded for reference while reading this brief.

Practical monopolies under the copyright and design patent laws are the same except for longer duration of copyrights.

It has been contended, particularly on behalf of the Copyright Office, that the monopoly granted under the copyright laws is fundamentally different in nature from the monopoly granted under the design patent laws. The argument is that a design patent covers not only the actual design disclosed in the patent but also variations which are considered to be patentable equivalents. In the case of a copyright, the argument is that only the identical item under copyright is protected and any change negatives infringement. An additional argument is that a party who innocently recreates the copyrighted item is free of the copyright monopoly.

In the practical administration of the design patent and copyright laws, the courts have allowed the design pat-

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entee or copyright owner substantial leeway in holding infringement of the respective monopolies. For copyrights, in the recent case of *Woolworth* v. *Contemporary Arts, Inc.*, 344 U. S. 228, involving the question of damages only in this Court, the District Court of Massachusetts in that case, *Contemporary Arts, Inc.* v. *Woolworth*, 99 F.S. 739, applied this rule, as stated in its opinion, page 743:

> "There are some differences between the plaintiff's plaster model * * * and the Woolworth ceramic model * * * But, of course, it is not necessary that a copy be a 'Chinese copy' in order to find infringement." (citing cases).

The same leeway has been given to the design patentee. *Gorham* v. *White*, 81 U. S. 511.

Thus the actual monopolies enjoyed by the copyright owner and design patentee after creation of the monopoly work out in practice to be the same, except for the longer duration of copyright.

With regard to the second proposition that only the wilful or deliberate copier is guilty, the fact is that wilful infringement is presumed unless the defendant clearly proves to the contrary. A prima facie case of copyright infringement is the same as a prima facie case of design patent infringement.

In many instances it is a practical impossibility to prove that the alleged infringer exercised originality, and doubts on this score are resolved against him. It should be observed that the copyright owner's allegation of originality is only questioned in hazardous litigation and this constitutes a valuable and powerful advantage. If it is assumed that a copyrighted item becomes very popular, then innocent recreation to avoid infringement becomes impossible.

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The more popular a copyrighted lamp base (as an example) becomes, the more nearly copyright protection approaches design patent protection as far as benefits are concerned.

With respect to the damage provisions, the Copyright Act is much more severe than the Design Patent Act. Because of the heavy penalties of the Copyright Act, judicial review of the various provisions of the new regulations becomes so hazardous as to render the same practically impossible.

The effect of the decision below and respondent's contention undermines entire design patent law administration.

If a manufacturer of an ornamental utilitarian item, as an electric table, can entrench himself against competition and create his individual monopoly, then the Design Patent Laws become a dead letter. Under the punitive recovery provisions of the Copyright Law and the fact that the copyright monopoly is created at the whim of the manufacturer, the public will always be on the defensive. Such a state of affairs makes the primary consideration in copyrights the monopoly to the manufacturer. Consideration or benefit to the public becomes a poor second.

The purported benefit to the public of a disclosure under the Copyright Law of an alleged work of art becomes the shackle to restrain competition.

Present copyright law pertinent to respondents' statues has not changed since 1870.

In 1870 the copyright and patent laws were consolidated in one act. The laws were administered by the Copyright Office of the Library of Congress and Patent Office respectively. The copyright portion of the 1870 Act spe-

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cifically defined copyright coverage as being confined to works of *fine* art insofar as paintings, statues and sculpture were concerned. The same 1870 law referred to "original designs for a manufacture, bust, statue" as well as "articles of manufacture" as subject matter for design patents examined in the Patent Office. Works of fine art have always been restricted to *original* painting, statue and sculpture having no utility, created solely for the sake of art. This definition has been made by this Court in *U. S.* v. *Perry,* 146 U. S. 71. The implication is clear that the work of fine art must be the actual creation of an artist and not some article that has been manufactured, and certainly not a mass produced article.

It is thus clear that *original* statues not for manufacturing in quantity is work of fine art and the creative artist is encouraged to register his statue in the Copyright Office. The same act of 1870 directed an artist or any one who produced an original design for a bust or statue or an ornamental design for an article of manufacture to the Patent Office for design patent protection. The difference between the works of art handled by the Copyright and Patent Offices lay in the fact that the Copyright Office only handled fine art.

The government brief below and respondents' brief below practically concede that, for the issues here, the 1870 Copyright Act remained unchanged until 1909 and that between 1870 and 1909 the copyright registrations in issue would not have been legal.

Respondents allege that their rights to register for copyright a statue or lamp, either to be manufactured in quantity, originated in the 1909 Copyright law and continued without interruption to date.

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We agree that the present 1947 copyright law, as regards the issues here, is the same as the 1909 Copyright law. The enactment of the 1909 Copyright law was prompted principally by new problems arising out of the development of the motion picture industry and mechanical reproduction of music. The Committee report on the bill enacting the 1909 Copyright law (this report is found in Howell's COPYRIGHT LAW 3rd edition 1952 pp. 253-277) amply supports this. The 1909 law streamlined the 1870 law with respect to works of fine arts comprising paintings, statue and sculpture. The 1909 law in no way enlarged the coverage of the 1870 law with respect to paintings, statue and sculpture, as we will show by the interpretation of the Copyright Office.

The 1909 law omitted "fine" from "works of art" as superfluous. The regulations of the Copyright Office from 1909 to 1949, over a third of a century, interpreted "work of art" as work of *fine* art and generally administered the law in that regard. The Copyright Office referred work of art other than fine art to the Patent Office for design patent protection. For convenience the pertinent copyright regulation is herewith given.

> Regulation (1909—1926 reenacted—1949) (17 U.S. C.A. West Bound Vol. p. 182)
>
> "12(g) Works of art and models or designs for works of art.—This term includes all works belonging fairly to the so-called *fine* arts (paintings, drawings and sculpture.)
>
> The protection of *productions* of the *industrial arts utilitarian in purpose and character, even if artistically made or ornamented depends upon action under the patent law;* but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

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> Toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles are examples. The exclusive right to make and sell such articles, should not be sought by copyright registration." (Emphasis supplied)

The above regulation was not changed in the 1926 revision of the copyright regulations.

The 40 year construction placed upon the copyright law by the Copyright Office in its own regulation governing the practice is "in the highest degree persuasive, if not absolutely controlling in its effect." as said by this Court in *United States* v. *Graham,* 110 U. S. page 221.

The regulation quoted above, first promulgated in 1909, spelled out the traditional role of the Copyright Office as the repository for works of *fine* art, not as a receiving station for articles of manufacture having both ornamental and utilitarian values. Patent protection was specifically mentioned for the latter by the regulation.

The construction of the Copyright law given in the regulation quoted has a solid basis in the law. The 1909 law uses "work of art" without specifically defining this expression. Reference to section 86 of the 1870 act shows that specific items of "painting, drawing, chromo, statue, statuary, and of models or designs intended to perfected as works of the fine arts" were added for the first time to the field of copyright protection. The 1909 act integrates these items in "works of art; models or designs for works of art" in what has been and is now section 5 of the 1909 and present 1947 copyright acts.

The expression "reproductions of a work of art" in (h) of section 5 has always been defined by the regulations as "reproductions—as contain in themselves an artistic ele-

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ment distinct from that of the original work of art which has been reproduced" and thus contemplates additional or supplementary artistry as distinct from the original artistry.

To show that the 1909 act, insofar as painting, statue and sculpture is concerned, carried forward the provisions of the 1870 act, we may consider the provisions dealing with infringement liabilities. Section 101 part (b) of the 1947 Copyright Act which repeats section 25(b) of the 1909 act provides

> "First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;"

The act of 1870, which is conceded by respondents to be limited to fine arts, provided as follows:

> Section 100 (1870 Act.)
> "and in case of a painting, statue or statuary, he shall forfeit ten dollars for every copy of same in his possession, or which have by him been sold or exposed for sale."

The Committee report (Howell's The Copyright Law, 3rd ed. pp. 253-277) preliminary to the enactment of the 1909 act, made no specific comment on the elimination of "fine" from works of art and the general streamlining of the language embracing pertinent copyrightable subject matter. This indicates that the new legislation to be enacted in 1909 was not radically different insofar as works of art are concerned.

The contention of respondents that the 1909 act worked a fundamental change in the law with respect to works of art is not borne out. If any change in the relationship between design patent and copyright fields had been con-

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templated, the 1909 Committee report would most certainly have indicated. This Committee also handled patent legislation.

In the Committee hearings prior to the 1909 act, the Librarian of Congress testified

> "* * * the term 'work of art' is deliberately intended as a broader specification than 'works of the fine arts' in the present statute with the idea that there is subject matter (for instance, *of applied design, not yet within the province of design patents*), which may properly be entitled to protection under the copyright law." (Emphasis supplied.)

(Testimony of Mr. Herbert Putnam, Librarian of Congress, before the Committee of Patents of the House of Representatives on June 6, 1906, p. 11.)

The above clearly indicates an intention on the part of the sponsors of legislation not to overlap the activities of the Patent Office. The established practice of the Patent Office since 1840 to date has included designs with classical form and figure as applied to articles of manufacture. The book of exhibits filed herewith is a small but representative collection of early design patents showing this. Current design patents are illustrated in the Record, pp. 43-56.

The interpretation by the Copyright Office of the 1909 law as exemplified in the copyright regulations from 1909 to 1949 is fully justified.

1902 Design Patent Act had no effect on copyright field.

The beginning of the forty-year period during which the Copyright Office interpreted "works of art" as works of fine art began in 1909, seven years after the passage of the 1902 Design Patent Act. This 1902 Act streamlined the language of the earlier Act of 1870 (the Copyright and

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Design Patent Acts were consolidated) and amendments in much the same manner that the 1909 Copyright Act streamlined the language of the 1870 Copyright Act.

The Design Patent Act of 1902 changed the 1870 language

> "new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief; any new and original design for the printing of woolen, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture, * * * may, * * * obtain a patent therefor"

in the 1870 Act, to the 1902 language

> "Any person who has invented any new, original, and ornamental design for an article of manufacture, * * * may, * * * obtain a patent therefor."

in the 1902 act, which language has been retained to the present day.

The respondents and Court of Appeals below interpreted the streamlining of the 1902 Design Patent Act as narrowing the scope of design patents. This view of statutory interpretation is diametrically opposite to the view by respondents of the same streamlining in the 1909 Copyright Act. It is clear that both the 1902 design patent law and 1909 copyright law had similar effects in their streamlining of the earlier cumbersome language of 1870 without broadening the subject matter in either act.

This view in regard to the 1902 Design Patent Act is supported by the letter from the Commissioner of Patents, Mr. Allen, in 1902 to the Senate Committee on Patents.

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Commissioner Allen in sponsoring the 1902 Design Patent Act stated:

> "Sec. 4929, as it stands at the present time, contains the specific statement of a number of different subjects to which designs may be applied. *The proposed statute removes all this specific statement, for the reason that as the statute stands it does not include all the subjects which ought to be included and from the inclusion of a portion it suggests the non-inclusion of those not mentioned.* It is to be noticed however, that in spite of this enumeration of subjects of designs, the Act of February 4, 1887, which furnishes a remedy for infringement of design patents, gives this remedy against those who, without the consent of the owner, apply the design secured to 'any article of manufacture', or to those who sell or expose for sale 'any article of manufacture to which such design' shall be applied. Therefore, if the remedy is in terms applicable to any article of manufacture, the enabling act means nothing more by the enumeration of a lot of different subjects, and they have been on this account removed from the proposed statute." (Emphasis supplied.)
>
> (Senate Report No. 1139, 57th Congress, accompanying Bill S. 4647, dated April 18, 1902)

The Present Design Patent Laws.

The statutes governing the issue of design patents are found in Title 35 of the United States Code. Section 171 provides that "whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefore, subject to the conditions and requirements of this title."

The term of a design patent may be 3½, 7 or 14 years at the election of the applicant and requires government fees of $10.00, $15.00 and $30.00 respectively. The design application is subject to examination and the statute re-

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quires that the new and ornamental design must be patentable over prior known designs. The statutes relating to infringement provide for injunction and a minimum award of $250 which may be increased to cover the excess of such profit made by the infringer over and above $250.

Design patents cover only esthetic part of an article of manufacture.

It has long been well accepted law that a patent for a design relates only to the ornamental or esthetic aspect of an article of manufacture and has no relation whatsoever to the utility thereof. In fact, design applications have been rejected and patents invalidated if the design is dictated by mechanical or utilitarian considerations. The statute authorizing the issue of design patents has from the very beginning required that the design be new, original and ornamental.

This Court in the case of *Gorham* v. *White,* 81 U.S. 511, 525, defined the essential characteristic of a design patent. This case has never been altered or overruled by this Court and is applied by all lower courts in construing the objectives of the design patent statutes. On page 525 in the above decision this Court stated:

> "It is a new and original design for a manufacture, whether of metal or other material, a new and original design for a bust, statue, bas relief, or composition in alto or basso relieva; a new or original impression or ornament to be placed on any article of manufacture * * * or a new or original shape or configuration of any article of manufacture—it is one or all of these that the law has in view. *And the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form.*" (Emphasis supplied.)

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Perverted issue as presented by respondents in the court below.

In respondents' brief page 5 before the Court of Appeals in the Fourth Circuit—and the opinion of the Court of Appeals reflects this—the respondents stated that the real question presented is:

> "Where an artist — using traditional sculpturing techniques — creates and copyrights a statue with the intent of fulfilling the public demand both for the statue, per se, and for lamps embodying the statue, is the copyright infringed by one who copies the statue in a lamp?"

The question as presented to the Court of Appeals by respondents begs the very issue presented, namely, is the copyright valid? An invalid copyright obviously cannot be infringed. The question also assumes compliance with the terms of the Copyright Act by the copyright applicant. This is questioned in the opinion by the United States District Court in the case of *Stein* v. *Benaderet,* 109 F.S. 364—1952 previously referred to on page 13 here. This is the case where the Court found that the copyright applicant intended the statue as a base for a lamp, manufactured almost 20,000 of these lamps and sold only 5 statues to one person and made this sale following a legal decision in which another court referred to the fact that plaintiffs (respondents here) had sold none of their copyrighted product as statuettes.

It is clear, therefore, that the issue as defined by respondents in the court below and upon which the Court of Appeals based its decision, does not accurately reflect the facts here and is quite different from the question presented for decision here—Can a lamp manufacturer copyright his lamp bases?

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In this connection, it is pertinent to observe that the litigation instituted by respondents in the Ninth Circuit resulted in a decision by the Court of Appeals which was based upon the admission by the defendants in that litigation to the effect that the copyright was valid. Thus, the Court of Appeals in the Ninth Circuit had no occasion to consider the validity of the copyrights and simply concerned itself with infringement.

The question presented for consideration to this Court is based not upon the activities of petitioner but upon what the respondents have done. In other words, this entire issue questions the validity of the copyright based upon the actions of the respondents. Certainly no unauthorized acts of the petitioners could impair the validity of the respondents' copyright if the respondents themselves were free of fault. This important issue was completely lost sight of in the Court of Appeals for the Fourth Circuit. Instead—and it is apparent from the opinion of the Court of Appeals—the court focused its attention upon what the petitioners had done and assumed that the respondents pursued a proper course and had valid copyrights.

Distinguished authors have considered issues here and their conclusions favor petitioners' interpretation of copyright law.

In the work "American Copyright Law" by Arthur W. Weil, 1917 edition, page 84, the following quotation appears. This work is concerned with the 1909 Copyright law.

> "It should be noted that the only rights given the owners of copyright in completed works of art, in Section 1, are those given by sub-division (a). *In view of the existence of the statutes covering design patents, it is probable that under the copyright law, copyrightable designs or models are limited to those*

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for works falling within the fine arts, although cases can be readily conceived where the work might be one of fine art, because of its form and execution, and a work of useful art because of its intended use. In such an event, both a copyright and a patent should be procured for perfect protection." (Emphasis supplied.)

Section 1 (a) gives the right "To print, reprint, publish, copy and vend the copyrighted work;" Section 1 (b) gives the right"; to complete, execute, and finish it if it be a model or design for a work of art;".

In DEWOLFES—An Outline of Copyright Law (1925) p. 91, the author defines "works of art" and "reproductions of works of art."

"(g) Works of art; models or designs for works of art. Herein are included works of *fine arts,* such as paintings, sculpture and drawings, but not works of the useful arts, which are within the sphere of patent protection. *It would be desirable that the copyright law should contain special provisions for works of art applied to industry, and such legislation has been recommended, but so far not adopted.* The design patent act, however, provides protection for "new, original and ornamental designs for articles of manufacture". (U.S. Revised Statutes, sec. 4929).

(h) Reproductions of works of art. This class was intended to cover such works as engravings, lithographs, etchings, and other reproductions in which the reproducer has embodied an element of original artistic labor, upon which the copyright in each separate reproduction is based. Such reproduction, in order to secure copyright, must be made with the consent of the copyright proprietor of the work reproduced, unless such work is in the public domain." (Emphasis supplied.)

These scholars indicate that the design patent laws are the sole and exclusive means for protecting table lamps and other articles of manufacture.

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Fine arts defined by this court in the case of United States v. Perry.

The above case reported in 146 U.S. 71 was decided in 1892. This case concerns itself with the determination of whether stained glass windows were in the category of works of fine art or a work of industrial design. The case was brought under the provisions of a tariff act in existence at that time. This Court pointed out that the fundamental objective of a tariff act is to protect United States industry and United States labor from foreign competition. Such a consideration would apply to articles of manufacture contemplated by Design Patents as against works of fine art for copyright. The decision turned upon whether the item in question was such a work of art as to be subject to the duty imposed.

This Court on page 74 and 75 considered the subject of works of art broadly and divided works of art into four classes, as follows:

"For most practical purposes works of art may be divided into four classes: 1. The fine arts properly so called, intended solely for ornamental purposes, and including paintings in oil and water, upon canvas, plaster, or other material, and original statuary of marble, stone, or bronze. These are subject to a duty of 15 per cent.

2. Minor objects of art, intended also for ornamental purposes, such as statuettes, vases, plaques, drawings, etchings, and the thousand and one articles which pass under the general name of bric-a-brac, and are susceptible of an indefinite reproduction from the original.

3. Objects of art, which serve primarily an ornamental and incidentally a useful purpose, such as painted or stained glass windows, tapestry, paper hangings, etc.

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4. Objects primarily designed for a useful purpose, but made ornamental to please the eye and gratify the taste, such as ornamented clocks, the higher grade of carpets, curtains, gas-fixtures, and household and table furniture."

The object of art in a larger sense transcends ornamentation and partakes of a psychic quality in its desire to influence the intellect and evoke an emotional response. In distinction to this, the utilitarian quality in anything is directed to the physical sense and needs.

This Court in its definition of fine art undoubtedly had the larger objective of art in mind, and like the Court, we will use "ornamental purpose" in the sense as described here. It is, of course, well known that many works of fine art are hardly ornamental in the sense that they evoke pleasure or would be desirable to live with.

Only the first class was defined as fine art and included paintings, *original* statuary of marble, stone or bronze.

The second class defining minor objects of art is also intended for ornamental purposes but this Court pointed out that such minor objects of art are susceptible of an indefinite reproduction from the original. In other words, they can be manufactured in quantity. It is clear that fine art is not commercially reproducible in quantity.

The third and fourth classes are defined as having some useful purpose and it should be noted that Class 4 includes gas fixtures. With the substitution of electricity for gas in illumination, it is obvious that electric fixtures as lamps would now be put into this classification.

This Court pointed out that despite the evident artistry of a high order of stained glass windows that they were

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still products of industrial design. An electric table lamp would certainly fall in this same category and fall within design patent protection.

Example of copyrighted items.

In 1949, the Copyright Office adopted new regulations which perverted the Copyright law to justify registering such random items as follows:

From catalog of copyright entries. Vol. 1, parts 7-11 A, No. 2 (July-Dec., 1947) "Works of Art".

Design for button—GU 6636 (p. 89)
Pin up pig bank—GP 6079 (p. 90)
Design for glove bag—GP 6348 (p. 90)
Leather Tooling Design—GP 6742 (p. 91)
Design for bed spread—GP 6155 (p. 91)
Design for puppet stage and packing box combined—GU 7061 (p. 91)
Design for sewing selector—GU 6182 (p. 91)
Design for collapsible lamp shade—GU 5903 (p. 93)
Design for cemetery monument—GP 6831 (p. 96)
Doll design—GU 6819 (p. 96)
Bottle opener (metal figurine)—GP 5990 (p. 97)
Models for ash tray—GU 5945 (p. 97)
Designs for lamps—GU 6563 (p. 98)
Design for costume jewelry—GU 7148 (p. 98)
Design for hat and for container—GU 6834 (p. 98)
Design for game board—GP 6418 (p. 99)
Design for metal compact—GU 6709 (p. 100)
Model for child's purse—GU 5981 (p. 102)
Design for a belt buckle—GP 5923 (p. 105)
Ladies purse, billfolds design—GU 6164 (p. 105)

The above designs are for articles of manufacture having utility and are fundamentally similar to respondents' designs.

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Statue and lamp containing statue as base are distinct items having no relation to each other.

In accordance with the requirements of the Copyright law and regulations it is necessary for a person desiring copyright to publish the work with copyright notice thereon and register the copyright by depositing in the Copyright Office best editions of the work containing the notice of copyright together with an application (a simple form to be filled in) and fee of $4.00. (Sections 10—et seq. of Copyright Regulations)

As given on the reverse of the copyright application form (Record 32) "The 'date of publication' in the case of a work of which copies are reproduced for sale or public distribution is defined in the Copyright Act as 'the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority'."

Respondents here "published" electric table lamps allegedly carrying the copyright notice by selling the same. Thereafter respondents purported to comply with the copyright filing requirements by sending to the Copyright Office white plaster statuettes as the alleged best edition. In the copyright applications, the dates of first publication of the alleged copyrighted item in each such application was the date of sale of the complete lamp. As the attached chart on page 35 shows, the respondents made no sales of the statuettes corresponding to the copies filed for registration until long after the date of publication alleged in the application.

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PLAINTIFFS' PUBLICATION DATES AND SALE OF ELECTRIC TABLE LAMPS AND STATUETTES

(1)	(2)	(3)	(4)	(5)	(6)
Copyright Certificate Number	Publication Date Alleged in Copyright i.e. date of first sale.	Date First Lamp Sold	Date First Statuette Sold	Lamps Sold of Each	Statuettes Sold of Each
II-1721	July 15, 1949	July 15, 1949	Aug. 10, 1950	958	2
II-1723	July 15, 1949	July 15, 1949	Aug. 10, 1950	1098	2
II-1717	July 10, 1950	July 10, 1950	Nov. 22, 1950	2046	4
II-1724	July 10, 1950	July 10, 1950	Nov. 22, 1950	1829	1
CIH-1738	Jan. 25, 1950	Jan. 25, 1950	Nov. 24, 1950	759	1
CIH-1737	Jan. 25, 1950	Jan. 25, 1950	(none)	750	(none)
				7440	10
				Total Lamps Sold	Total Statuettes Sold

Compiled from Defendants' Interrogatories (R. 8-10); Plaintiffs' Answer to Interrogatories (R. 10-14); Stipulation, R. 15; and Copyright Certificates (R. 31-37).

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A table lamp which includes a statue as its base is not a "reproduction of a work of art" within the meaning of this phrase. The statue itself is still the same statue whether it is in the lamp base or outside of the base. But a lamp containing a statue is a different article than a statue alone. The copyright law, creating a long monopoly with minimal requirements from a registrant, has always been strictly construed. The law requires that the item submitted for copyright registration conform with the work of art published or sold. For three dimensional works of art, as statue or sculpture or for paintings, the law and regulations permit photographs to be filed in the Copyright Office in place of the original work of art or in place of exact copies thereof.

In the present case, the registrant did not comply with the requirement of the law and the copyright is therefore invalid.

The zeal of the Copyright Office to expand its field of operations is responsible for new policy not justified by law.

The 1949 regulations illustrate a tendency on the part of the Copyright Office to extend its field of operations unless curbed. That the Copyright Office had its eye on business rather than on the law when adopting the 1949 regulations is evidenced in an article entitled "Copyrighting Jewelry" by Sam B. Warner, Register of Copyrights, Library of Congress, published in the September, 1948 issue of Jewelers' Circular—Keystone—reproduced in the appendix. The article discusses the shortcomings of design patent procedure and then under the heading of "work of art" the author indicates that he is not sure of his legal ground. First the author states that he may be wrong

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in thinking that artistic jewelry is subject to copyright. Then he states (Appendix pp. C, D)

> "Even if I am wrong in believing that artistic jewelry is copyrightable, jewelry manufacturers have little to lose by trying to copyright it. The fee for copyright registration is very low, only $4.00, and ordinarily, it is not a complicated process. A competitor is likely to feel that it is better not to copy a piece of artistic jewelry that bears a copyright notice, than to take the risk of having to pay the heavy statutory damages which would be imposed if he were wrong."

The conflicting opinions of the Courts of the 4th and 7th Circuits and other decisions.

The Court of Appeals for the 7th Circuit in *Stein* v. *Expert,* 188 F. (2) 611, 612 conflicting with the decision in the 4th Circuit of the case at bar and involving the same issues in its opinion stated:

> "Congress has provided two separate and distinct classes or fields of protection, the Copyright and the Patent."

The Court of Appeals explicitly considered design patents relative to copyrights. In an earlier decision in 1943, *Taylor Instrument Company* v. *Fawley-Brost Co.,* 139 F. (2) 98 the Court of Appeals for the 7th Circuit had held that there was no overlap between copyrights and patents.

The opinion in the case at bar of the Court of Appeals for the 4th Circuit expressly states that it does not pass upon the question of overlap of copyright and design patent fields. In the case of *De Jonge and Co.* v. *Breuker and Kessler Co.,* 235 U. S. 33 (1914), the question of possible overlap was *not* considered by the Supreme Court.

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The Supreme Court of the United States noted in that case, (page 36)

> "The Circuit Court of Appeals, reserving its opinion as to whether the sphere of copyright and patent for design overlapped, agreed with the Circuit Court that, if this was a painting, every reproduction of it must bear the statutory notice (of copyright) and affirmed the dismissal of the bill."

The Court of Appeals for the third Circuit in this *De Jonge* case had stated—*De Jonge* v. *Breuker,* 191 F. 35,

> "In this case the Circuit Court (trial court) decided that a painting, if it possess artistic merit, be suitable, also, for use as a design, may at the owner's election, be protected either by copyright or by patent, *on this broad question we express no opinion.*" (Emphasis supplied)

In the *De Jonge* case before the Supreme Court of the United States in the opinion, Justice Holmes remarked (page 37)

> "The appellant is claiming the same rights as if this work were one of the masterpieces of the world, and he must take them with the same limitations that would apply to a portrait, a holy family, or a scene of war."

The above *De Jonge* case was brought under the provisions of the 1909 Copyright Act. It is apparent from the above quoted remark that a copyright applicant by the act of copyrighting asserts to the world that his painting is a work of fine art on par, in the opinion of the copyright applicant, with the masterpieces of the world. The statuette of respondents, under the above decision, is being placed on par by respondents with the masterpieces of the world and the claim to the copyright by respondents is accordingly limited as has been pointed out before.

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In the recent case of *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.,* 344 U.S. 228, the sole question before this court was the measure of recovery, and particularly the "in lieu" provision in the copyright law. The subject matter of the copyright in this case was "Cocker Spaniel in Show Position." The Woolworth Company innocently had purchased the statuettes from a source that had copied the copyrighted dog statues. Even though the Woolworth Company purchased these dogs in good faith and thus were innocent infringers, nevertheless the punitive provisions present in the copyright law were applied. In this *Woolworth* case, the copyrighted item was purely ornamental, having no utility.

The Court of Appeals for the 4th Circuit in its opinion (R. 82) in the case at bar stated that *King Features Syndicate* v. *Fleisher,* 299 F. 533

> "involved an issue somewhat similar to that of the instant case."

In the *King Feature* case, the plaintiff has created cartoon characters known as "Barney Google", and "Spark Plug" or "Sparky", a horse. The plaintiff had published his cartoons and had syndicated them to newspapers throughout the country with wide circulation, running into millions, where they appeared daily as comic strips. Defendants manufactured a toy horse which was copied after plaintiff's cartoon character, "Splug Plug" and, in addition, labeled it and sold it as "Spark Plug" and "Sparky". The Court held that this was an infringement of plaintiff's rights.

The Court of Appeals in its opinion of the case at bar also relied upon *Fleisher Studios* v. *Ralph H. Freundlich, Inc.,* 73 F. (2) 276.

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In the *Fleischer* case the plaintiff had created a new cartoon character known as "Betty Boop". This character had been exhibited in motion picture cartoons and had become very popular and widely known. In addition, plaintiff's licensee had sold large quantities of "Betty Boop" dolls. The Court there said:

> (p. 278)—"What the appellant constructed is recognizable by an ordinary observer as having been taken from the copyrighted source. Such is an infringement."

To the same effect is *Hill* v. *Whalen & Martell,* 220 F. 359 wherein it was held that a dramatic performance using actors dressed like "Mutt" and "Jeff" infringed the copyrighted "Mutt and Jeff" cartoons.

After considering the above decisions the opinion of the Court of Appeals in the case at bar continues (Record 83)

> "These cases differed from the instant case in that there the copyrightee did not use the copyrighted material in a form different from a form under which the material was copyrighted. In our case the material was copyrighted as statuettes, but was afterwards embodied by the copyrightee in a lamp base. Nor did the plaintiffs here create any fictional characters and associate them by name, such as 'Barney Google' or 'Betty Boop', which became well known to the public."

The logic in the above quotation appears to be misdirected. The very differences pointed out between the case at bar and the prior cases destroy the pertinence of such prior cases to the instant issues.

In *Bleistein* v. *Donaldson Co.,* 188 U. S. 239, relied upon by the 4th Circuit Court of Appeals, the plaintiffs had copyrighted three chromolithographs or pictorial illustrations used in advertisements for a circus. The Supreme

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Court then held that *circus advertisements* are within the protection of the Copyright Laws. Obviously this case supports petitioner's position. It is printed material in whatever form produced that is protected by copyrights, not articles of manufacture.

The utility for which a unique masterpiece may be designed is theoretical and the artistic execution of the masterpiece disregards practical considerations for mechanical duplication.

Respondents have referred to such outstanding art treasures as Cellini's salt cellar in reference to copyright as against design patent protection. The respondents allege that, under the theory that a salt cellar has utility, following the petitioner's reasoning no copyright protection would be possible. The respondents' argument as applied to this example illustrates a superficial application of petitioner's reasoning.

First of all, it should be observed that the creators of art masterpieces of the world and of lesser works of art made their creations without regard to possible mechanical duplication. Many three dimensional works of art are impossible to reproduce mechanically because of undercutting or intricacy of the design. They can not be enshrouded within a mold and thereafter removed from the mold without breaking either the art work or mold into parts. The real artist pleases and expresses only himself and in his supreme egotism wants to leave only one of a work to posterity rather than a brood of one work to a contemporary public.

By contrast, an industrial designer or designer of applied art has his eye partly on art and partly on the problems of manufacture and sale. The creation of such an artist or designer is for duplication and is intended first

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to please the public, rather than the artist, and to endow the product with such artistic lines as to make it susceptible to manufacture to insure commercial success of the item.

The objective of an industrial designer may have as much cultural and social value in a large sense as the objective of an artist who wants to create a unique work. However, society through the medium of government and enactment of copyright and patent laws has prescribed separate rewards to be claimed by one who asserts himself to be a creator of fine art or by the other who asserts himself to be the creator of articles of manufacture, however artistic they may be.

The selection as to whether he is a fine artist or designer of applied art is made by the creator in the act of claiming copyright or applying for design patent protection.

Apart from the question of freedom of artistic design present in fine art and absent in industrial or applied art, the question of utility is also present. It is true that Cellini made his art treasure ostensibly for holding salt. In view of the rarity of the item, it is a fair inference that the salt cellar never actually fulfilled its function as a salt cellar to be used by the public. The possible ceremonial use of this salt cellar at some state banquet of a patron of Cellini would be no evidence of utility. Its status as a museum piece removes it from the category of a salt cellar to a work of fine art.

It is apparent, therefore, that the utility of Cellini's salt cellar is theoretical. There is no question but that this salt cellar would qualify for copyright registration. If, however, Cellini designed and manufactured this item in quantity so that the general public could have salt cellars,

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then an entirely different conclusion would be reached. In such case, the salt cellar becomes an article of manufacture having utility in addition to its ornamental value and would therefore have to be protected by design patent.

As Justice Holmes remarked in the *De Jonge* v. *Breuker and Kessler* case, 235 U. S. 33, 37

> "The appellant is claiming the same rights as if this work were one of the masterpieces of the world, and he must take them with the same limitations that would apply to a portrait, a holy family, or a scene of war."

It is submitted that the distinction drawn here is the only practical distinction between copyright and design patent protection. To permit statutory copyright on any three dimensional item having some artistic attributes and alleged by the copyright claimant as being original would result in the creation of such a vast number of monopolies (whose legality is hazardous to determine) as to not only undermine the entire concept of design patent protection, but would have a profoundly adverse effect upon business generally. The contentions of respondents tend to impart a new and radical interpretation to the copyright laws.

The case of *Baker* v. *Selden* (101 U.S. 99-1879) considered the relationship between copyright and mechanical patent protection and held the two fields utterly distinct.

On page 105, this Court stated:

> "The object of the one is explanation; the object of the other is use: The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters patent."

A work of art in its original form represents the artist's explanation of the subject matter. The manufacture in quantity of alleged art—with or without utilitarian characteristics—represents use of an ornamental article of manufacture and limits the article to design patent protection.

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Respondents are misusing copyrights.

In *Morton Salt Co.* v. *Suppiger Co.*, 314 U.S. 488 (1942), this Court stated, p. 492:

> "It is a principle of general application that the courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest. (citing cases)"

In the above case, the misuse of mechanical patents was condemned.

Many decisions have condemned the misuse of trademark rights. In *Edward Thompson Company* v. *American Law Book Company*, 122 F. 922, 926, and *Stone and McCarrick* v. *Dugan Piano Co.*, 220 F. 837, the misuse of copyright was condemned.

It is submitted that the respondents are misusing their copyright registrations in claiming a monopoly on an article of manufacture having utility, a table lamp in this instance, when in fact the copyright purports to cover, according to the claim filed in the Copyright Office, a statuette as a work of art.

New copyright policy is a disturbing influence.

The fact that the question of overlap of copyright and design patent laws was never passed upon by this Court before, even though the question had been discussed by students of copyright law and lower courts years ago, is believed to be due to the policy of the Copyright Office up to 1949, as enunciated by its regulations in generally confining its field of activities to works of fine art. Since 1949, the change in policy of the Copyright Office has encouraged copyright registrations of articles outside the proper sphere of activity of the Copyright Office and has

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engendered considerable litigation. It is thus noteworthy that within about four years of the change of policy of the Copyright Office on "works of art", the formerly moot question of overlap of copyright and design patent law has become a live issue, to the point where Courts of Appeal disagree and requires the resolution of such differences by this Court.

It would therefore appear that the change in policy on the part of the Copyright Office as declared by its new regulation has resulted in hurting the public rather than helping it.

CONCLUSION.

The general punitive nature of copyright laws is known to the public and copyright notices engender fear and command respect. The article by Mr. Warner, Register of Copyrights, in the September, 1948 issue of the Jewelers' Circular-Keystone (in Appendix page A-E) illustrates this.

> "Even if I am wrong in believing that artistic jewelry is copyrightable, jewelry manufacturers have little to lose by trying to copyright it. The fee for copyright registration is very low, only $4.00, and ordinarily, it is not a complicated process. A competitor is likely to feel that it is better not to copy a piece of artistic jewelry that bears a copyright notice, than to take the risk of having to pay the heavy statutory damages which would be imposed if he were wrong."

The respondents here used the copyright procedure as a stratagem, to avoid the design patent statutes and requirements and also took advantage of the superior psychological value of a copyright notice as compared to any possible design patent notice. In short, respondents

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used copyright as a scare weapon to suppress competition. This is contrary to public interest.

The petitioners therefore respectfully pray that:

1. The judgment of the Court of Appeals of the 4th Circuit in the case at bar be reversed and that the judgment of the District Court be affirmed.

2. The copyrights in issue here be declared null and void.

3. A copyright on a statuette is not valid when the claim to copyright is based upon the sale of a lamp embodying the statuette.

4. A copyright on a statuette is destroyed by the manufacture and sale in quantity of electric table lamps embodying the statuette when such sales are made by or under the copyright owner.

5. An electric table lamp manufactured and sold in substantial quantity is an article of manufacture and as such is not within the purview of the Copyright Code but if patentable, must be protected under the provisions of the design patent statutes.

6. A manufacturer of electric table lamps who designed a statuette base for a lamp, who sold lamps embodying the base, did not comply with the requirements of the Copyright Code by submitting the statuette alone as a work of art to the Copyright Office and alleging the date of sale of such lamp as the publication date of the work of art.

Respectfully submitted,

MAX R. KRAUS,
ROBERT L. KAHN,
Counsel for Petitioners.

Date—November 6, 1953.

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THE DESIGN PATENT STATUTES.

1842—(5 Stat., 543)

"Section 3. * * * That any citizen * * * who * * * invented * * * any new and original design for a manufacture, whether of metal or other material or materials, or any new and original design for the printing of woolen, silk, cotton, or other fabrics, or any new and original design for a bust, statue, or bas-relief or composition in alto or basso relievo, or any new original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed or painted or cast or otherwise fixed on, any article of manufacture, or any new and original shape or configuration of any article of manufacture, * * * may obtain a patent therefor."

1861—(12 Stat., 246)

Section 3 of the 1842 Patent Act re-enacted.

1870—(16 Stat., 198)

"Section 71. * * * That any person who, by his own industry, genius, efforts, and expense, has invented or produced any new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief; any new and original design for the printing of woolen, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture, * * * may, * * * obtain a patent therefor."

1874—(Section 4929, Revised Statutes)

Section 71 of the 1870 Act re-enacted.

1902—(32 Stat., 193)

"Any person who has invented any new, original, and ornamental design for an article of manufacture, * * * may, * * * obtain a patent therefor."

1952—(35 U.S.C. 171, 66 Stat., 792)

"Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, * * *"

THE COPYRIGHT STATUTES.

1870—(16 Stat., 198, 212)

"Section 86. Any citizen of the United States * * * who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, * * * shall * * * upon complying with the provisions of this chapter, have the sole liberty of printing, re-printing, publishing, completing, copying, executing, finishing and vending the same, * * *"

1874—(Section 4952, Revised Statutes)

Section 86 of the 1870 Act re-enacted.

1909—(35 Stat., 1076)

"Section 5. * * * The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: * * *

(g) Works of art; models or designs for works of art;

(h) Reproductions of a work of art; * * * "

1947—(17 U.S.C. 5, 61 Stat., 652)

Section 5 of the 1909 Act re-enacted.

THE COPYRIGHT REGULATIONS

From 1909 to 1949

(Regulations first issued in 1909, reissued in 1926 and continued to 1949)

17 U.S.C.A. West Bound Vol., p. 182.

12g. WORKS OF ART MODELS OR DESIGNS FOR WORKS OF ART—**This term includes all works belonging fairly to the so-called fine arts.** (Paintings, drawings and sculpture)

The protection of productions of the industrial arts, utilitarian in purpose and character, even if artistically made or ornamented depends upon action under the patent law, but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

Toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, **or similar articles are examples. The exclusive right to make and sell such articles should not be sought by copyright registration.**

13.(h) Reproductions of works of art. This term refers to such reproductions (engravings, woodcuts, etchings, casts, etc.) as contain in themselves an artistic element distinct from that of the original work of art which has been reproduced. (Emphasis supplied)

1949—To Date

Title 37, Code of Federal Regulations, Chap. II, Copyright Office.

Sec. 202.8 — WORKS OF ART **(Class G)**—(a)—In general.

This class includes works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. * * *

Sec. 202.9 — Reproductions of Works of Art **(Class H).**

This class includes published reproductions of existing works of art in the same or a different medium, such as a lithograph, photoengraving, etching or drawing of a painting, sculpture or other work of art.

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APPENDIX — Page A

Excerpt from THE JEWELERS' CIRCULAR-KEYSTONE (Sept. 1948)

COPYRIGHTING JEWELRY.

Protecting a jewelry design by copyright is a simple process compared to the long, involved patent. Here's how to do it.

by SAM B. WARNER
Register of Copyrights
Library of Congress

"Why should a manufacturer of jewelry want to copyright his products? Is he not much better off to patent them?" I have often been asked. Certainly, he is. Patent protection is much broader than copyright protection. If the design for a piece of jewelry is patented, nobody in the United States can make jewelry according to that design for the life of the patent, even if he also originates a similar design in entire ignorance of the patented design. On the other hand, copyright gives protection only against copying. Nevertheless, protection against copying may be of great value. If one manufacturer puts an original artistic piece of jewelry on the market and shortly afterwards his competitor comes out with a piece that is a duplicate of it, a court is not likely to believe that the competitor did not know of the original product and copied it.

Most Jewelry Not Patentable

Patent if you can, but as you all know, most jewelry cannot be patented. Its design may be original and new, but still it may not be patentable. Nothing can be patented

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which is not the product of invention and invention requires a manifestation of genius, that is, of something beyond the power of the ordinary craftsman with knowledge of the prior art. Courts can very seldom be persuaded that new designs for jewelry contain the manifestation of genius necessary for an invention. But I need not tell you manufacturers why very little of your jewelry is patentable. You all have attorneys and doubtless all have tried to patent some of your best designs.

For copyright, invention is not necessary. I can walk up to the favorite spot for photographing the Washington Monument and snap my Brownie camera. I am the author of the resulting photograph. It is my product and I can copyright it even though thousands of people before me have snapped their cameras from exactly the same spot. My copyright will doubtless be valueless, at least in the United States, because it will not prevent anybody else from also photographing the Washington Monument and from making a photograph of it as much like mine as two peas in a pod. Similarly, if a manufacturer designs a piece of artistic jewelry that is just like other jewelry available in the United States, it will do him no good to copyright it. His copyright will prevent a competitor from copying his jewelry, but it will not prevent the competitor from copying other pieces of jewelry just like the copyrighted piece. Therefore, never try to copyright a piece of jewelry that you do not believe to be original.

"If it is worthwhile to copyright artistic jewelry, why is it not the practice of the trade to copyright such jewelry just as motion picture companies copyright their products and as cartoonists copyright the 'funnies'?" you are doubtless asking. There are two reasons. One reason is that ideas of what can be copyrighted and what con-

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stitutes a work of art have gradually widened with the years. The other is that previous Registers of Copyrights have not been willing to accept artistic jewelry for copyright registration and no manufacturer has thought copyright of sufficient value to make it worth his while to spend the thousands of dollars necessary to go to court and force the Register of Copyright to accept his product.

Work of Art?

It is, of course, entirely possible that I may be wrong in thinking that artistic jewelry is copyrightable. The Constitution of the United States authorizes Congress to grant copyright protection to writings of authors. The early copyright acts covered only books and things akin to books. The present statute, however, also covers motion pictures, music, photographs, prints and labels, and in Class G "Works of art; models or designs for works of art." Former registers always accepted paintings and statues as works of art regardless of how poor these works were. For the most part they also accepted book-ends and ashtrays that were more or less artistic. I cannot see why if a book-end or an ashtray can be a work of art, it is impossible for a piece of jewelry to be a work of art. In fact, I cannot see why a piece of jewelry may not be just as much a work of art as many of the paintings and statues that everybody will admit to be works of art. Certainly the fact that jewelry has utility, if it has, is not the deciding factor, because nobody from his day to this has doubted that Benevento Cellini's saltcellar was both a work of art and a dispenser of salt.

Even if I am wrong in believing that artistic jewelry is copyrightable, jewelry manufacturers have little to lose by trying to copyright it. The fee for copyright registra-

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tion is very low, only $4.00, and ordinarily, it is not a complicated process. A competitor is likely to feel that it is better not to copy a piece of artistic jewelry that bears a copyright notice, than to take the risk of having to pay the heavy statutory damages which would be imposed if he were wrong.

Note that I have referred throughout to artistic jewelry. Since the Copyright Act does not refer to jewelry as copyrightable, but only to works of art, jewelry that does not constitute a work of art cannot be copyrighted. Congress has not given the Copyright Office any criteria for determining when a piece of jewelry constitutes a work of art and the Office has not been able to devise any. But since Congress has ordered the Copyright Office to give copyright registration to works of art, the Office will obey and do its best to determine whether any piece of jewelry that you send to it for copyright registration is in fact a work of art. If it turns you down, it will return to you the money you have paid and the jewelry or photograph of the jewelry you have sent it.

Note also that I have referred to the manufacturer of a piece of artistic jewelry as its author. The Copyright Act speaks only of authors; the author of a musical composition, the author of a photograph, the author of a statue, and so forth. By the author of a piece of artistic jewelry is meant of course the man who designed the jewelry or the person or corporation that employed him to design it.

Suppose now that we have decided that it is worthwhile to try to copyright a new piece of artistic jewelry, the next question is how to do it. As you are manufacturers and only interested in jewelry that is manufactured for sale, we need not consider how to copyright designs for jewelry. You first must place the copyright notice, that is the letter

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C in a circle followed by the name of the copyright owner, that is the originator of the piece or his assignee, on every piece of jewelry that is to be protected by copyright. This should not be difficult. Silver manufacturers customarily place the word "Sterling" on their products. A "C" in a circle followed by the name of the manufacturer takes only a little more space. Even the back of an earring should be large enough to hold such a notice.

The next thing to do is to publish the jewelry, that is to place it on sale, sell it or publicly distribute it. When this has been done, an application for copyright registration on Form GG, $4.00 and whatever number of photographs are necessary to identify the jewelry must be sent to the Copyright Office. Form GG explains the advantages and disadvantages of sending also two pieces of the jewelry. The Copyright Office will record the receipt of your application and send you a certificate of copyright registration. If your piece of jewelry is really a work of art, this certificate will prove of great value to you should you ever have occasion to prove your copyright in a court. If your piece of jewelry turns out not to be a work of art, the fact that you registered it in the Copyright Office will at least furnish you a permanent record of what you manufactured and when.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

No. 228

EMANUEL L. MAZER AND WILLIAM ENDICTER, DOING BUSINESS AS JUNE LAMP MANUFACTURING COMPANY,

Petitioners,

VS.

BENJAMIN STEIN AND RENA STEIN, DOING BUSINESS AS REGLOR OF CALIFORNIA

Respondents.

Brief for Respondents

WILL FREEMAN,
GEORGE E. FROST,
135 S. LaSalle St.,
Chicago 3, Illinois.

CHARLES F. BARBER,
701 Union Trust Bldg.,
Washington, D.C.,
Attorneys for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

No. 228

EMANUEL L. MAZER AND WILLIAM ENDICTER, DOING BUSINESS AS JUNE LAMP MANUFACTURING COMPANY,

Petitioners,

VS.

BENJAMIN STEIN AND RENA STEIN, DOING BUSINESS AS REGLOR OF CALIFORNIA

Respondents.

Brief for Respondents

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (R. 70) is reported at 204 F(2d) 472. The opinion of the District Court (R. 57) is reported at 111 Fed. Supp. 359.

JURISDICTION

The Court has jurisdiction under Title 28, United States Code, Section 1254.

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QUESTION PRESENTED

Whether the copyright in a statue as a "work of art" is infringed by a lamp embodying a copy of the statue when:

1. The statue was created in standard art form by the application of traditional clay modeling and waste mold sculpturing technique by an artist intending to profit from all applications of the work, and

2. The statue was copied and used as the base portion of the lamp to display conspicuously all the art of the statue.

STATUTES INVOLVED

1. Title 17, United States Code (Copyrights):

Section 1. Exclusive Rights as to Copyrighted Works.

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

* * * * *

Section 5. Classification of Works for Registration. The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

* * * * *

(g) Works of art; models or designs for works of art.

(h) Reproductions of a work of art.

* * * * *

The above specifications shall not be held to limit the subject matter of copyright as defined in

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section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title.

Section 207. Rules for Registration of Claims.
Subject to the approval of the Librarian of Congress, the Register of Copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this title.

2. Rules and Regulations of the Copyright Office:

Section 202.8 Works of Art (Class G)

(a) *In general.* This class includes works of artistic craftsmanship in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. * * *
(37 C.F.R. 1949 ed. 202.8)

3. Title 35, United States Code (Patents):

Section 154. Contents and Term of Patent
Every patent shall contain * * * a grant to the patentee * * * of the right to exclude others from making, using, or selling the invention * * *.

Section 171. Patents for Designs

Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor * * *.

The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided.

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STATEMENT OF THE FACTS

This is an action for copyright infringement seeking injunctive relief and damages. The copyrights in issue were granted on applications specifying class h "Reproductions of a work of art" (Plf. Ex. 1-6, R. 31-37).

The copyright certificates were issued after deposit by Respondents of physical statues as specimens of each work (R. 15, 21). Copies of the deposits are in evidence as Plaintiffs' Exhibits 1A to 6A, inclusive. A specimen withdrawn from the files of the Copyright Office is in evidence as Plaintiffs' Exhibit 8 (R. 28-29).

The subjects of the works are dancing human figures. Each was executed by preparing a number of rough sketches, a composite drawing from the sketches, and then modeling the figure in clay over an armature, using the drawing as a guide (R. 21). The clay model in each instance was then used to prepare a waste mold and the rubber production mold made from the latter (R. 21).

The statutes here involved are part of a line of some 90 separate forms which Respondents make and sell (Plf. Ex. 12, R. 40B (see original exhibit), R. 19). It is the policy of Respondents to sculpture every piece as an original work (R. 19). The line was started in 1947 and differed from the static pieces then available in incorporating a fluidity of movement (R. 19). Respondents stress originality and freshness and make an effort to confine their products to innovations and fine sculpture (R. 19).

Respondents sell the statues in two forms. In one form, a lamp socket and shade are added to provide a complete lamp of which the statue forms the base portion (Plf. Ex. 12, R. 40B). Respondents principal financial return is de-

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rived from sales in this form (R. 10-14). The statues are also sold without additional parts, although the sales in this form are relatively small in number (Plf. Ex. 12, R. 40A, R. 10-14). It is estimated that for the line as a whole a total of 200 statues have been sold without lamp parts (R. 22). Respondents have never refused to sell a statue without lamp parts added (R. 23).

The accused infringements are in evidence as Plaintiffs 1B to 6B, inclusive (R. 17). These are lamps, the bases of which are in every material respect identical with the original statues filed in the Copyright Office by the Respondents. Every element of art in the copyrighted work is displayed in the lamp form sold by Petitioners (Plf. Ex. 15, R. 40C).

Petitioners do not deny that the accused products are copies of Respondents' copyrighted works. Nor do they contest the finding of the Copyright Office that they are "works of art." The only defense pressed is that Respondents should have obtained design patents instead of copyrights (Brief, pp. 6-7).

The District Court considered the case of *Stein* v. *Expert Lamp Co.*, 188 F(2d) 611 (C.A. 7, 1951), to be applicable and accordingly gave judgment for Petitioners (R. 60, 66). The Court of Appeals for the Fourth Circuit considered the *Expert* case distinguishable and in any event declined to follow it (R. 80). The Court accordingly gave judgment for Respondents (R. 84).

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SUMMARY OF ARGUMENT

The works in suit are statues of dancing human figures, a standard art form (Plf. Ex. 1A to 6A). They were prepared by application of the traditional sketch—clay model —waste mold art technique (R. 21; 20 Encyclopedia Britannica 223, 230, 1945 Ed.). Respondents sell the works as simple statues or with lamp socket and shade added to form a lamp (Plf. Ex. 12, R. 40A, R. 22). The copies here accused were sold with lamp socket and shade added, the statues being conspicuously displayed as the base portions of the units (Plf. Ex. 15, R. 40C).

Petitioners' apply a self-created rule that copyright can cover only works incapable of volume reproduction prepared solely to gratify the "supreme egotism" of the sculptor (i.e. Brief, p. 41). This art gallery concept finds no support in the statutes, old or new. Its adoption would also require rejection of the circus poster case where this Court upheld the copyright to a drawing made for a circus poster and reproduced in large quantities for advertising the circus. *Bleistein* v. *Donaldson,* 188 U.S. 239, 249 (1903).

Sections 5(g) and 5(h) of the Copyright Code (17 U.S.C.) require a "work of art." This language is a deliberate enlargement from the more narrow term "models or designs intended to be perfected as works of the fine arts" used in the law prior to 1909 (R.S. 4952, 16 Stat. 198, 212). The difference between a "work of the fine arts", on the one hand, and a "work of art", on the other hand, lies in the limitation of the former to works created "for their own sake and without relation to the utility of the object produced" whereas the latter encompasses all which is produced "as paintings, sculpture, etc., by the

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application of skill and taste" (Webster's New International Dictionary, 1950). The works here surely fulfill the broad standard "works of art". Indeed, they may well be considered works of fine art.

Since at least 1909 it has been the practice of the Copyright Office to grant registrations to works in standard art form although they can be—and are—embodied in some useful object (R. 25-28). This practice is entitled to great weight as a correct application of the law. *U.S.* v. *Citizens Loan & Trust Co.,* 316 U.S. 209, 214 (1942). The weight to be attached to this practice is further increased by the fact that it existed promptly after passage of the 1909 Copyright Act. *Norwegian Nitrogen Products Co.* v. *U. S.,* 288 U.S. 294 315 (1933). Its importance is further increased by the fact that it is a practice that has existed for over 40 years. *U. S.* v. *Schreveport Grain,* 287 U.S. 77, 84 (1932).

The Copyright Code of 1947 (61 Stat. 652) and the Patent Code of 1952 (66 Stat. 792), reenact Section 5 of the 1909 Copyright Act and the 1902 Design Patent Act, respectively, without substantial change. This reenactment of the statutes here involved embodies an adoption by Congress of the construction of the statutes by the Copyright Office. *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U.S. 110, 114-115 (1939).

Nor can monopoly phobia weigh in favor of Petitioners. Rather it supports Respondents. Copyright is merely the sole right to multiply copies. One can always escape the bounds of a copyright by creating an original work, however similar it may be to the copyrighted work. *Bleistein* v. *Donaldson,* 188 U.S. 239, 249 (1903). In contrast, design patents confer a broad monopoly, good as against subse-

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quent creators and not just copyists. Independent creation will not save the design patent infringer. *Alfred Bell & Co.* v. *Catalda Fine Arts,* 191 F(2d) 99, 103 (C.A. 2, 1951). The procedural and other differences between design patent and copyright merely reflect this fundamental difference in scope.

Any effort to protect the works here by design patent would be a corruption of the Design Patent Law. That law is intended to protect pleasing design which amounts to "invention"—a term inapplicable to statues of the dancing human figure. Indeed, the courts have squarely held that the human figure cannot involve "invention" over the "prior art." *In re Smith,* 77 F(2d) 513, 514 (C.C.P.A., 1935); *Frankart* v. *Apt Novelty Co.,* 57 F(2d) 757 (S.D.N.Y., 1931). Objects such as the stockings of *Glen Raven* v. *Sanson,* 189 F(2d) 845, 848 (C.A. 4, 1951) —prepared in the first instance to achieve the useful end and then ornamented to the extent permitted by their purpose—are appropriate for design patent protection. Works in standard art form such as those here involved are clearly inappropriate for such protection.

Respondents are content with the narrow protection against copying provided by the copyrights—they willingly face the competition of non-copyists. Surely they are not seeking too much.

The Court of Appeals for the Fourth Circuit in the present case and the Court of Appeals for the Ninth Circuit in *Rosenthal* v. *Stein,* 205 F(2d) 633 (June 26, 1953), properly refused to follow *Stein* v. *Expert Lamp Co.,* 188 F(2d) 611 (C.A. 7, 1951). The *Expert* case should be rejected because the court misinterpreted the regulation of the Copyright Office to mean the opposite of what is in-

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tended. The court also wholly overlooked the narrow character of the copyright as compared to the broad patent monopoly which is good even as against subsequent independent creators. The legal commentators have uniformly refused to endorse the *Expert* case. i.e. 27 *Indiana Law Journal,* 130, 134 (1951); 21 *George Washington Law Review,* 353, 366 (1953); 66 *Harvard Law Review,* 877, 884 (1953; 52 *Michigan Law Review,* 33, 64, 68 (1953); Derenberg, Copyright No-Man's Land, (1953) *Copyright Problems Analyzed,* 215, 238, 246. The *Expert* case is also distinguishable on the facts.

The judgment should be affirmed.

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ARGUMENT.

A.

The Statues Here Are "Works of Art" Within the Meaning of the Copyright Code and the Copyright Office Properly So Found.

1. *The works here are statues of the human figure in action prepared by traditional art technique.*—Physical specimens of the works are in evidence as Plaintiff's Exhibits 1A-6A and 8. Each portrays a dancing human figure. The figures were executed by preparing a number of rough sketches, a composite drawing, and then modeling in clay over an armature using the drawing as a guide (R. 21). The clay model thus made was then used to make the waste mold from which the rubber production mold was formed (R. 21). This process is described in Encyclopedia Britannica under the title "Sculpture Technique" (Vol. 20, p. 217 et. seq., especially pp. 223 and 230, 1945 Ed.).

Plainly these are "works of art" as that term is used in Section 5(g) and 5(h) of the Copyright Code (17 U.S.C. 5). The works are sculpture, a standard art form. They portray the human figure, a traditional subject of sculpture. They are prepared by recognized art technique. The Copyright Office examined the physical specimens submitted and found them to be works of art under the statute (R. 29). The human figure statues of the present case are identical in character with the dog figure statue held infringed in *Woolworth* v. *Contemporary Arts,* 193 F(2d) 162 (C.A. 1, 1951) (Affirmed on issue of damages at 344 U.S. 228).

Respondents specified class (h) because the works here are three-dimensional reproductions of the unpublished

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The Works Here Registered Are Sculpture, a Standard Art Form. They Were Prepared by Traditional Art Technique. By Any Test They Are "Works of Art". Like Any Physical Objects—and Any Work of Art—They Can Be Used for Paper Weights, Lamps, and the Like, Without Altering the Artistic Display,

(Picture shows Plaintiffs' Exhibit 8)

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sketches originally prepared by Mrs. Stein. The Register of Copyrights has testified that the policies and practices of the Copyright Office are the same for class (h) and class (g) (R. 30).

The statues involved in this cause should be contrasted with "industrial designs" such as the stocking of *Glen Raven* v. *Sanson,* 189 F(2d) 845, 848 (C.A. 4, 1951), which are prepared and shaped in the first instance to attain a useful end. Pleasing appearance is then imparted to such products in an endeavor to attain maximum ornamentation compatable with the intended purpose and reasonable cost. No recognized art form is sought for or obtained.* No traditional art technique is applied. Such objects—whose design is dictated primarily by purpose and whose ornamentation is always secondary to that purpose—form the major area of operation of the Design Patent Law.

2. *Statues are not disqualified from copyright protection because they can be and are incorporated in objects produced for sale.*—Like all statuary the works here can be used and sold as paper weights, door stops, and the like, and parts can be added to form lamps, book ends, and similar objects, all without altering the artistic display. Indeed, the works here are sold in greatest number in the form having lamp socket and shade added, a form in which they are sold by both Respondents and Petitioners (R. 22, 17). Respondents also sell the works in the simple statue form (Plf. Ex. 12, R. 40A, R. 22). These varied ap-

* We use the term "standard art form" or "recognized art form" to designate artistic expression in painting drawings or sculpture as distinguished from artistic jewelry and the like which may embody artistic craftsmanship not expressed in one of these basic forms. The present record presents no issue as to the status of works in other than standard art form.

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plications are inherent in any sculpture, including that of the copyrighted dog statue of *Woolworth* v. *Contemporary Arts,* 193 F(2d) 162 (C.A. 1, 1951) (aff'd. on damages, 334 U.S. 228). To disqualify any sculpture from copyright because it can be applied to such objects is to disqualify all sculpture.

a. *This Court has squarely rejected the argument that commercial reproduction or intent to commercialize is fatal to copyright.*—In *Bleistein* v. *Donaldson,* 188 U.S. 239 (1903), the work involved was a circus poster of the usual type, showing scenes performed in the circus. The Circuit Court of Appeals held the copyright invalid because "if a chromo, lithograph, or other print, engraving or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of useful arts * * *" (104 Fed. 993, 996). Justice Holmes, rejecting this view and speaking for this Court, stated in part:

> "* * * A picture is none the less a picture, and none the less a subject of copyright, that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus. Of course, the ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that would excommunicate the paintings of Degas." (188 U.S. 239, 251)

This Court also rejected any test based on the intent of the artist, stating that "the special adaptation of these pictures to the advertisement of the Wallace shows does not prevent a copyright" (188 U.S. 239, 251).

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The same yardstick that dictates the conclusion that a circus poster is copyrightable requires the conclusion that a statue finding a market as the distinctive part of a lamp assembly is likewise copyrightable. Indeed, the logic applies in double measure for the *Bleistein* decision was under a statute using the expression "works of fine art" whereas the present case involves the broader expression "works of art" introduced into the Copyright Law in 1909 (188 U.S. 239, 250).

Petitioners overlook the healthy rule of this case in laying down supposed rules that copyright demands a "cultural treasure" (p. 9) that "cannot be duplicated by mechanical means" (p. 10) and prepared by a "real artist (who) pleases and expresses only himself and in his supreme egotism wants to leave only one of a work to posterity rather than a brood of one work to a contemporary public" (p. 41). Indeed, Justice Holmes specifically put arguments of this kind to rest by stating that "if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt." (188 U.S. 239, 252).

The soundness of both the *Bleistein* decision and the practice of the Copyright Office is demonstrated by the widespread use of works of art in useful objects. Rodin's "Thinker" is undeniably a "work of art". Yet it is a matter of common knowledge that this work can—and has —been used on book ends. Surely, Congress never in-

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tended to deprive works of this kind of copyright protection.

Art objects having direct usefullness form a great class of artistic expression. Cellini's celebrated salt cellar—useful and intended to be useful—stands as one of his major works (5 Encyclopedia Britannica, p. 97, 1945 Ed.). Artistic incense burners, mugs, cups, plates, candle holders, and the like find a place in every art gallery as shown by the illustrations attached.* Petitioners would deprive all of this truly great art of access to the Copyright Law and, even if copyrighted in some nonuseful form, they would deny the protection of the copyright to a complete appropriation and display of the art in a useful product.

The principle of the *Bleistein* case has been followed by numerous more recent decisions including: *King Features* v. *Fleisher,* 299 Fed. 533, 535 (C.C.A. 2, 1924) (copyrighted "Barney Google" cartoons infringed by doll reproduction); *Fleisher* v. *Freundlich,* 73 F(2d) 276, 278 (C.C.A. 2, 1934) (copyrighted "Betty Boop" cartoons infringed by doll reproduction—copyright owner engaged in the manufacture of the dolls through a licensee); *Pelligrini* v. *Allegrini,* 2 F(2d) 610 (E.D.Pa., 1924) (copyrighted religious candle holder infringed by copy sold commercially); *Jones* v. *Underkoffler,* 16 Fed. Supp. 729, 730-732 (M.D.Pa., 1936) (copyrighted cemetery memorial infringed by cemetery use of copy).

b. *The legislative history of the Copyright Law and the Design Patent Law reveals a Congressional intent to afford copyright coverage to statues irrespective of possible or actual application to useful products.*—In the Consolidated

* Illustrations taken from pamphlet entitled "Art Treasures from the Vienna Collections", copy deposited with the Clerk. Hundreds of other books might equally well have been chosen.

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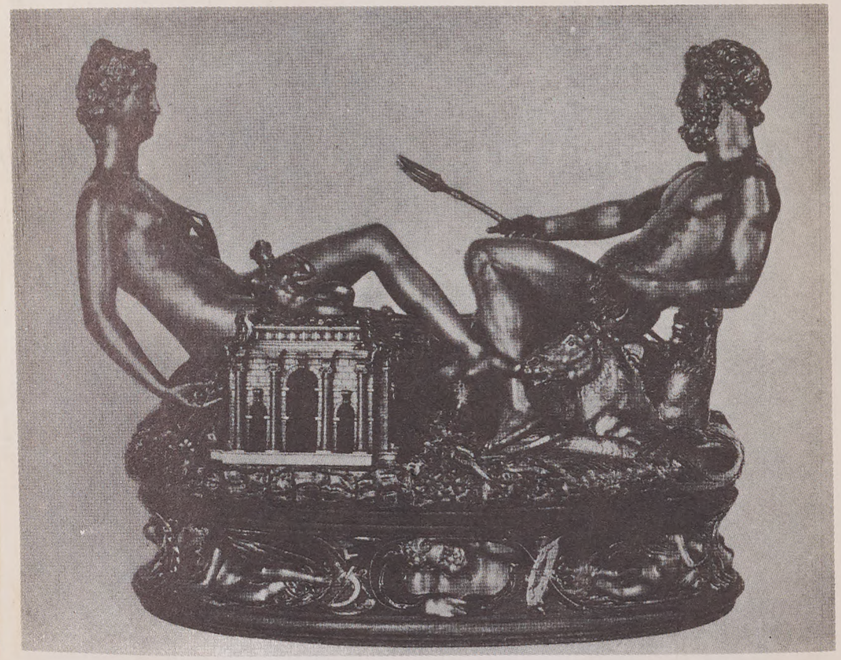
Plate XXXVIII



NO. 192. CELLINI. GOLD SALT. ABOUT 1540-1543

Plate XL

NO. 182. THE BURGUNDIAN COURT GOBLET. NETHERLANDISH, ABOUT 1425-1450

Plate XLII

NO. 211. JASPER TANKARD. EARLY XVII CENTURY

Many Classical Works of Art Are Intended To Be Both Useful and Artistic. Surely These Qualify for Registration Under the Broad Phrase "Works of Art." Petitioners Would Limit the Copyright Law in a Manner Leading to an Unsound Result Never Intended by Congress.

Patent, Trademark, and Copyright Act of 1870 (16 Stat. 198) statues were expressly listed under both the Copyright Law and the Design Patent Law. The Copyright Law used the expression "statue, statuary, and of models or designs intended to be perfected as works of the fine arts" (Section 86). The Design Patent Law used the expression "original design for a manufacture, bust, statue, alto-relievo, or bas-relief" (Section 71). The coordinate plan of this statute continued until 1902 and 1909 when the Design Patent Law and the Copyright Law, respectively, were changed. Under this plan statuary was specifically listed under both the Copyright Law and the Design Patent Law, although the language of the former indicated some intention to confine copyright to the "'fine arts.'"*

Congress emphasized the distinction between fine art and art in general in the Copyright Act of June 18, 1874 (18 Stat. 78), using the following language:

> "* * * the words 'engraving', 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright laws, but may be registered in the Patent Office. * * *"

The Design Patent Law was changed to essentially its present form in 1902 (32 Stat. 193). Since that date this law has referred only to "ornamental design for an article of manufacture" and has not referred to statuary as such (35 U.S.C. 171).

---

* Nothing in the 1870 statute disqualified a work, otherwise copyrightable, from registration merely because made in quantity or subject to useful applications. The act of August 1, 1882 (22 Stat. 181) shows that Congress never intended any such limitation for it states that "manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright may put the copyright mark * * * upon the back or bottom of such articles * * *"

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The Copyright Law was expanded in 1909 to list "Works of art; models or designs for works of art" (35 Stat. 1076). All reference to the intent of the artist or to works of the "fine arts" was deleted. At the hearings on this Act, the Librarian of Congress testified:

> "* * * the term 'work of art' is deliberately intended as a broader specification than 'works of the fine arts' in the present statute with the idea that there is subject matter (for instance, of applied design, not yet within the province of design patents), which may properly be entitled to protection under the Copyright Law." (Testimony of Mr. Herbert Putnam, Librarian of Congress, before the Committee of Patents of the House of Representatives on June 6, 1906, p. 11.)

The works here surely come within the broad term "art" which is:

> "* * * 10. That which is produced, as paintings, sculpture, etc. by the application of skill and taste. * * *" (Webster's New International Dictionary, 1950.)

Indeed, they may well be classified as "fine art" which has been defined as:

> "Art which is concerned with the creation of objects of imagination and taste for their own sake and without relation to the utility of the object produced." (Webster's New International Dictionary, 1950.)

Petitioners seem to construe the parenthetical remark of Mr. Putnam as limiting the expanded area of the 1909 Copyright Act to "applied design, not yet within the province of design patents" (Brief, p. 24). As a matter of plain English, Mr. Putnam was merely giving an example—not a limitation— for he carefully prefaced his statement with the qualification "for instance". Moreover, even if we assume *arguendo* that Mr. Putnam used this

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THE DESIGN PATENT STATUTES.

1842—(5 Stat., 543)

"Section 3. * * * That any citizen * * * who by his * * * own industry, genius, efforts, and expense, may have invented or produced any new and original design for a manufacture, whether of metal or other material or materials, or any new and original design for the printing of woolen, silk, cotton, or other fabrics, **or any new and original design for a bust, statue,** or bas-relief or composition in alto or basso relievo, or any new original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed or painted or cast or otherwise fixed on, any article of manufacture, or **any new and original shape or configuration of any article of manufacture,** * * * may make application to the Commissioner of Patents * * * and the Commissioner may grant a patent therefor * * *".

1861—(12 Stat., 246)

Section 3 of the 1842 Patent Act re-enacted.

1870—(16 Stat., 198)

"Section 71. * * * That any person who, by his own industry, genius, efforts, and expense, has invented or produced any new and **original design for a manufacture, bust, statue,** alto-relievo, or bas-relief; any new and original design for the printing of woolen, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or **any new, useful, and original shape or configuration of any article of manufacture,** * * * may, * * * obtain a patent therefor."

1874—(Section 4929, Revised Statutes)

Section 71 of the 1870 Act re-enacted.

1902—(32 Stat., 193)

"Any person who has invented any new, original, and ornamental design for an article of manufacture, * * * may, * * * obtain a patent therefor."

1952—(35 U.S.C. 171, 66 Stat., 792)

"Whoever invents any new, original and **ornamental design for an article of manufacture** may obtain a patent therefor, * * *"

THE COPYRIGHT STATUTES.

1870—(16 Stat., 198, 212)

"Section 86. Any citizen of the United States * * * who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, **statue, statuary, and of models or designs intended to be perfected as works of fine arts,** * * * shall * * * upon complying with the provisions of this chapter, have the sole liberty of printing, re-printing, publishing, completing, copying, executing, finishing and vending the same, * * *"

1874—(Section 4952, Revised Statutes)

Section 86 of the 1870 Act re-enacted.

1909—(35 Stat., 1076)

"Section 5. * * * The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: * * *

(g) **Works of art; models or designs for works of art;**

(h) Reproductions of a work of art; * * *"

1947—(17 U.S.C. 5, 61 Stat., 652)

Section 5 of the 1909 Act re-enacted.

THE HISTORY OF THE DESIGN PATENT AND COPYRIGHT LAWS SHOWS THAT A STATUE—ORIGINALLY ONLY DESIGN PATENT SUBJECT MATTER—IS NOW COPYRIGHT SUBJECT MATTER UNRESTRICTED BY ANY REFERENCE TO "FINE ART". THE WORKS HERE ARE IN STANDARD ART FORM. THEY ARE PROPERLY COPYRIGHTED AND THE COPYRIGHTS ARE INFRINGED.

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1870—(16 Stat., 198, 212)

"Section 86. Any citizen of the United States * * * who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, **statue, statuary, and of models or designs intended to be perfected as works of fine arts,** * * * shall * * * upon complying with the provisions of this chapter, have the sole liberty of printing, re-printing, publishing, completing, copying, executing, finishing and vending the same, * * *"

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expression in a limiting sense and further that the Act is so limited, the statues here are clearly registrable for they are of the human figure in action—a subject that has been repeatedly held incapable of "invention" over the "prior art" as required for design patent. *In re Smith,* 77 F(2d) 513, 514 (C.C.P.A., 1935); *In re Smith,* 77 F (2d) 514, 515 (C.C.P.A., 1935); *Frankart* v. *Apt Novelty Co.,* 57 F(2d) 757 (S.D.N.Y., 1931). Indeed it is the artistic character of the works and their expression in a classical art form that makes the whole concept of "invention" over the "prior art" utterly inappropriate.

c. *The Copyright Office has for many years registered statues like those here in suit.*—In his deposition in this case the present Register of Copyrights testified:

> "The practice of the copyright office is to register claims for copyrights in any work which in our opinion is a work of art, even though such work has a mechanical or utilitarian aspect. Such works must be the product of artistic craftsmanship and may include works of art such as those used for bookends, ash trays, piggy banks and so forth." (R. 25)

At a later point he stated:

> "Again, we frequently will receive applications for the registration of paintings on plates, for example. We register the painting on the plate but we are not concerned with the fact that the material upon which the painting is made may be intended as an article of utility for the handling of food. In other words the practice of the office with respect to this phrase about which I am asked is not to undertake to register or deal with the mechanical or utilitarian aspects, but exclusively to determine whether the work that is submitted to us is a work of art and we disregard the question of whether it has in addition a mechanical or utilitarian function." (R. 27)

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Nor is this practice one of recent origin. The Register testified that it was well established in 1946 (R. 25) and that it is his understanding that the practice developed after the 1909 enlargement of the Copyright Law to the broad term "works of art" (R. 27-28).

This practice of the Copyright Office is entitled to great weight as a correct application of the law. *U.S.* v. *Citizens Loan & Trust Co.,* 316 U.S. 209, 214 (1942); *Norwegian Nitrogen Products Co.* v. *U.S.,* 288 U.S. 294, 315 (1933). Particularly, is this true when the practice was in existance promptly after passage of the 1909 Copyright Act. *Norwegian Nitrogen Products Co.* v. *U.S.,* 288 U.S. 294, 315 (1933). Its importance is further increased by the fact that it is a practice that has existed for over 40 years. *U.S.* v. *Schreveport Grain,* 287 U.S. 77, 84 (1932).

Moreover, Section 5 of the 1909 Copyright Act was reenacted without change in the Copyright Code of 1947—almost 40 years after the practice here in question arose (61 Stat. 652). The implied Congressional approval of the practice is made complete by the enactment of the Patent Code of 1952, which reenacted the Design Patent Law without substantial change (66 Stat. 792, 35 U.S.C. 171). This Court has repeatedly held that reenactment of a statute "which had previously received long continued executive construction, is an adoption by Congress of such construction". *U.S.* v. *Cerecedo Hermanos,* 209 U.S. 337, 339 (1908); *U.S.* v. *Dakota-Montana Oil Co.,* 288 U.S. 459, 466 (1933); *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U.S. 110, 114-115 (1939).

Petitioners seek comfort in the Copyright Office regulations in effect from 1909 to 1948 (Brief, p. 21). In so doing they misread the regulations. These regulations spelled

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out only the extreme cases of "paintings, drawings, and sculpture", which are copyrightable and "productions of the industrial arts, utilitarian in purpose and character, even if artistically made or ornamented", which are not copyrightable (37 CFR 1939 ed. 201.4 (b) (7)). These regulations in no way limited registration of works such as sculpture, which were in standard art form, because they were or could be embodied in useful objects. They merely stated that the Copyright Office would not accept so-called industrial designs, such as the stocking of *Glen Raven* v. *Sanson,* 189 F(2d) 845, 848 (C.A. 4, 1951), wherein shape is in the first instance dictated by considerations of utility and then pleasing appearance is imparted to the extent it is consistent with the purpose to be served. The present works obviously fall in the first class and not the second, a fact that squares with the testimony that the works would be registrable under the practice existing since at least 1909 (R. 25-28).

In 1948 the Copyright regulations were rewritten in language intended to fill the gap between the extremes set forth in the earlier regulation. As rephrased, the regulation here applicable reads:

> "* * * This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware,and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. * * *" (37 CFR 1949 ed. 202.8)

Under this new regulation the Copyright Office registers works, such as artistic jewelry, which are works of art and yet are not expressed in a standard art form as statuary. Considerable publicity attended promulgation of this new regulation, both by reason of its official publication in the

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Federal Register and by reason of contemporaneous articles such as that prepared by the then Register, Mr. Sam B. Warner, reproduced as the Appendix to Petitioners' brief (Jewelers Circular-Keystone, September 1948; reprinted at 31 Jl. Pat. Off. Society 487 (1949); and see Hugin, Copyrighting Works of Art, 31 Jl. Pat. Off. Society 710 (1949)).

Of course the new regulation did not alter the copyrightability of works such as those of this case which are in a standard art form such as sculpture. These works were registrable under the prior practice and without regard to the question of whether they were or could be applied to useful objects (R. 25-28). Mr. Warner's article itself so states (Petitioners' Brief App. 8c). The new regulation does, however, have significance in that it emphasized the earlier practice as well as the change. The incident publicity—particularly when followed by reenactment of the Design Patent Law without substantial change in 1952 (66 Stat. 792)—shows that the practice met with the approval of Congress.

Whether we apply the yardstick of the statutory language, the legislative history, the practice of the Copyright Office, or the decided cases, we reach the same conclusion—copyright extends to the market place and applies to statuary irrespective of actual or possible useful application.

B.

Copyright to a Statue as a Work of Art Is Infringed by Sale of Copies of the Statue With Lamp Parts Added.

The crucial aspect of the copies here accused lies in the complete and conspicuous display of each and every element of art in the original statues. Petitioners merely embedded a pipe in the plaster during the molding process

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Plaintiffs' Exhibit 15—Also compare physical exhibits 1A (original) and 1B (copy)

The Accused Products Copy and Conspicuously Display Every Artistic Feature of the Copyrighted Originals.

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and thereafter attached a lamp socket and shade. Plaintiffs' Exhibit 15, an advertisement showing one of Petitioners' products, shows how the lamp shade accents rather than detracts from the full display of the art (R. 40C). Nothing is covered or hidden. The art is dominant. Since the copies embody the entire work of art—and the copyright is granted to the "work of art"—there is infringement.

In *King Features* v. *Fleisher,* 299 Fed. 533 (C.C.A. 2, 1924), the court stated:

> "The statuary, made of materials, expressed the sculptor's concept of beauty, and the picture expresses the artist's concept of beauty. The concept of beauty expressed in the materials of the statuary or drawing, is the thing which is copyrighted. That is what the infringer copies. The Copyright Act was intended to prohibit the taking of this conception. The Copyright Act protects the conception of humor which a cartoonist may produce, as well as the conception of genius which an artist or sculptor may use." (299 Fed. 533, 536)

In that case the court held the copyrights to the "Barney Google and Spark Plug" cartoons infringed by three dimensional doll copies. In *Fleisher* v. *Freundlich,* 73 F(2d) 276 (C.C.A. 2, 1934), the court reached the same result in a case involving the "Betty Boop" cartoons. There the copyright proprietor, through a licensee, distributed thousands of toys and dolls like the accused copies in addition to publication of the cartoon form of the character. See also *Hill* v. *Whalen,* 220 Fed. 359 (S.D.N.Y., 1914) (dramatic performance by actors dressed as "Mutt" and "Jeff" an infringement of copyrighted cartoons).

The Courts of Appeal for the Fourth Circuit and the Ninth Circuit have correctly looked to identity of artistic

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concept to hold the copies of the statues embodied in lamps as infringements of Respondents' copyrighted statues.

C.

Monopoly Phobia Should Not Defeat the Plain Meaning of the Copyright Code, Particularly Since the Issue Is Between Narrow Copyright Protection and Broad Patent Protection.

1. *Copyright extends only to actual copies of the work involved.*—The modern copyright law—as did its antecedents—turns on the element of copying. Absent copying, there can be no infringement of copyright. *Bleistein* v. *Donaldson,* 188 U.S. 239, 249 (1903); *Arnstein* v. *Porter,* 154 F(2d) 464, 468-9 (C.C.A. 2, 1946). It has been aptly stated that a copyright merely gives "the sole right of multiplying copies." *Jeweler's Circulating* v. *Keystone Publishing,* 281 Fed. 83, 94 (C.C.A. 2, 1922). Copyright is accordingly a very narrow thing. Others are free to create the identical work—provided only that they abstain from copying.

This limitation on the scope of copyright is of vital commercial importance. One need only to look to the lower court opinions in the *Woolworth* case to see the heavy practical burden placed on the copyrightee and the strong defense weapon available to the accused infringer. *Contemporary Arts* v. *Woolworth,* 93 Fed. Supp. 739 (D. Mass., 1950); *Woolworth* v. *Contemporary Arts,* 193 F(2d) 162, 165-167 (C.A. 1, 1951). Surely, Petitioners do not seriously suggest that the courts either ignore or minimize this burden faced by every copyright plaintiff (Brief, p. 18).

We would not be before this Court if the Petitioners had created their own works. We invite them to do this and will face their competition when and if they do their

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own creating. The fact is that the minute identities or "fingerprints" traceable from Respondents' originals to the accused copies are so condemning that no defense of this kind has been pressed.

2. *Patent gives a monopoly even as against independent creators.*—In keeping with its derivation from the law of patents for technical inventions, design patent gives a true monopoly. Protection is not limited to copying. It is wholly irrelevant that the accused infringer in fact independently made the design patented. The public is wholly deprived of any access to the patented subject for the full term of the grant. The economic consequences of this unlimited monopoly as against independent inventors are necessarily great for it cuts off their opportunity *even to use their own creations.*

This broad reach of the patent grant is plain from the statute itself. The relevant portion of Section 154 of the Patent Code (Title 35, U.S.C.) provides that "Every patent shall contain * * * a grant to the patentee * * * of the right to exclude others from making, using, or selling the invention throughout the United States * * *". cf: 35 U.S.C. 171 and 173. The courts have consistently stated that the accused infringer cannot escape because he is himself an independent inventor. *Alfred Bell & Co.* v. *Catalda Fine Arts,* 191 F(2d) 99, 103 (C.A. 2, 1951). This Court in effect rejected the same defense in *Gorham* v. *White,* 14 Wall. 511, 528-31 (1871) where it looked to general similarity and refused to hold the design patent limited to copies that might have been "struck from the same die".

In *Bobbs-Merrill* v. *Straus,* 210 U.S. 339, 343-51 (1908) this Court very carefully pointed out the distinction be-

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tween the limited "copy" protection associated with copyright and the broad patent monopoly good against subsequent creators. There the plaintiff relied upon an asserted analogy between patent and copyright in an attempt to justify resale price maintenance of a copyrighted book. In rejecting the analogy, this Court quoted the following with approval:

> " 'There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes, that the cases which relate to one subject are not altogether controlling as to the other' " (210 U.S. 346)

3. *Congress has logically provided unlike procedures for these unlike grants.*—Indeed, in view of the fundamental differences between scope of protection it would be most peculiar not to find different procedures in the Copyright Office and the Patent Office and different terms of the grants. Copyright—being effective only as against copyists—does not turn upon what other independent creators have done. It is confined to intellectual forgery. Originality of the author is the key to the grant as well as a complete defense to an infringement charge. Prior art or "anticipation" is utterly irrelevant. *Alfred Bell* v. *Catalda Fine Arts,* 191 F(2d) 99, 103 (C.A. 2, 1951). The law accordingly requires only the presence of original art and a determination by the Copyright Office that there is art. 17 U.S.C. 5(g); 17 U.S.C. 11.

The Copyright Office is fully conscious of its duty to register only that which qualifies as a "work of art". The Register of Copyrights has testified that such examination was made in the present case and that the Office found the requisite art (R. 28-29). An illustrative court

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decision resulting from the exercise of this examining power is found in *Brown* v. *Warner,* 161 F(2d) 910 (App. D.C., 1947). See also *Waring* v. *W.D.A.S.,* 327 Pa. 433, 194 A. 631 (note 2, 194 A. 633-4) (Sup. Ct. Pa., 1937).

On the other hand, the broad patent monopoly arrests even independent creation. The measure of infringement is ultimate result, not the presence or absence of copying. It follows that the grant is appropriate or inappropriate in accord with the presence or absence of substantial change beyond the skill of the art. This is the invention concept which has been part of the Patent Law since at least 1850 and is now embodied in Section 103 of the Patent Code (Title 35, U.S.C.). Accordingly, the Patent Office must find invention before it is authorized to issue the grant. 35 U.S.C. 131.

In each instance the public is fully protected against improper issuance of the grant. The accused copyright infringer can always show that no work of art is involved. *Alfred Bell* v. *Catalda Fine Arts,* 191 F(2d) 99, 102 (C.A. 2, 1951). Similarly, the accused design patent infringer can attack the grant as not based on invention. *Frankart* v. *Apt Novelty Co.,* 57 F(2d) 757 (S.D.N.Y., 1931).

The differences between design patent, on one hand, and copyright, on the other hand, reflect more than historical accident. They recognize the futility of evaluating a work of art from the standpoint of the "prior art". It is absurd to seek "invention" in Verricchio's "David" as compared to Donatello's work of the same title a few years earlier (see 20 Encyclopedia Brittanica opposite page 202, 1945 Ed.). Nevertheless each is a distinct work of art. Nor can one intelligently pursue the question of whether Rodin's "Thinker" is an invention over the millions of human

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males that preceded the work. It is probably fair to say that the finer the art, the less applicable the concept of "invention". Congress wisely provided that works of art should be given limited protection based on their art and not upon irrelevant inquiries directed to the wholly inapplicable concept of "invention."

4. *Speculations as to possible design patent protection cannot preclude copyright protection.*—Even if we assume *arguendo* that the Design Patent Law covers the works here involved there is no inherent reason why they are not "works of art". To be sure, Respondents face the competition of non-copyists by following the copyright route, but this does not alter the character of the works as embodying artistic craftsmanship. Neither the Copyright Law nor the Design Patent Law is in any respect restrictive. Neither refers to the other. Each sets forth its own requirements which, if met, qualify the work for registration. Indeed, the Copyright Code specifically states that the Register "shall" issue the certificate where there is compliance "with the provisions of *this title*". 17 U.S.C. 11.

The cases are clear that if a work qualifies for both copyright and design patent protection the creator can elect between the two types of protection but must abide by the election once made. These cases include:

> *Jones* v. *Underkoffler,* 16 Fed. Supp. 729, 730 (M.D. Pa., 1936) (Cemetery memorial copyrighted as a "work of art." Held: Copyright valid and infringed by construction of a copied memorial. Defense that protection could only be procured under the Design Patent Law rejected because "* * * Such designs would accordingly appear both copyrightable and patentable." (quoting Weil on Copyright, p. 227))

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In re Blood, 23 F(2d) 772 (App. D.C., 1927) ("* * * The applicant was entitled to apply for a patent for the design as a hosiery label, or he might complete the label, and register the design so completed. He could not do both. * * *")

DeJonge v. *Breuker and Kessler,* 182 Fed. 150 (C.C. E.D.Pa., 1900) ("* * * It clearly appears that the painting now in question is artistic in thought and execution, and it was therefore entitled to protection by a copyright, if a copyright was desired. It appears just as clearly that neither the artist nor his patron intended to reproduce the painting as such a work of art is ordinarily reproduced, but intended to multiply it as a design for a fancy paper to cover boxes and other articles for the holiday season. Nevertheless, when the painting left the artist's hand, it was of such a character as made it eligible either for copyright or for patent; at the option of the author or owner. * * *" 182 Fed. 150, 151).

Rosenthal v. *Stein,* 205 F(2d) 633, 635 (C.A. 9, June 26, 1953) ("The area in which a thing would be either a copyrightable work of art or a patentable design, but not the other, is perhaps unsurveyable. Whether a thing is a work of art or a patentable design, or is a patentable design and not a work of art, cannot be determined by excluding one from the other. A thing is a work of art if it appears to be within the historical and ordinary conception of the term art. A thing is a design by the same token. The two are not necessarily distinct one from the other. Neither goes to the functioning of a utility.")

5. *Respondents' decision to obtain copyright and face the competition of other creators should be honored.*—Respondents believe the works here properly belong under the Copyright Law, not the Design Patent Law. They are statues of the human figure in action, a classic art form. They are wholly unlike industrial designs such as

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hosiery which are prepared in the first instance to perform a function and then pleasing appearance is imparted to the extent the functional purpose will permit.

We have difficulty—shared by the courts—applying the word "invention" as used in the Design Patent Law to an object of art as distinguished from an industrial design. The Court of Customs and Patent Appeals has apparently disqualified the normal human figure—regardless of pose—from the scope of the Design Patent Law, for it has declared:

> "The difference between what constitutes invention and a mere imitation of natural forms suggests itself in the gargoyles of architecture and the unicorn and dragons of the English and French heraldry. These abnormal forms might well constitute invention and be the subject of design patents, while mere imitation of reproductions of a normal horse or serpent or human face might not. It is a departure from the normal and usual which, in such cases, might constitute invention." (*In re Smith,* 77 F(2d) 513, 514 (1935)).

See also *In re Smith,* 77 F(2d) 514, 515 (C.C.P.A., 1935) and *Frankart* v. *Apt Novelty Co.,* 57 F(2d) 757 (S.D.N.Y., 1931) (nude figure of girl not design patentable).

Surely Respondents are not to be penalized because they rely on the above decisions, the language of the Copyright Law, and the practice of the Copyright Office, to follow the copyright route rather than the design patent route. They accept the limitations of the copyright grant and willingly face the competition of those who create their own art. All they seek is protection from plagiarists—people who make molds from the artistic creations of others and sell them as their own and as "California Modern" rather than executing their own sculpture (Plf. Ex. 15, R. 40C;

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R. 17). Do Respondents seek too much? Must they "fall between two stools", as one commentator has expressed it, after having done their best to secure legal protection? Derenberg, Copyright No-Man's Land (1953) *Copyright Problems Analyzed* (C.C.H.) 215, 236.

Of one thing we can be sure. If we were before this Court with design patents the Petitioners would here be arguing that copyrights should have been obtained instead.

D.

The Expert Case.

Stein v. *Expert Lamp Co.*, 188 F(2d) 611 (C.A. 7, 1951), so heavily relied upon by Petitioners should not be followed. In the first place both the District Court and the Court of Appeals in that case misinterpreted the regulations of the Copyright Office. The District Court stated:

> "* * * It is the court's opinion the phrase 'mechanical and utilitarian aspects' means that the plaintiff could have no monopoly on the mechanics of making the statuette and further could claim no monopoly on the use to which it could be put. The court is therefore of the opinion that the object under consideration is not copyrightable subject matter." (96 Fed. Supp. 97, 98)

The Court of Appeals, affirming this decision without modification, quoted the regulation in full as supporting the conclusion reached (188 F(2d) 611, 613).

The present record shows beyond all doubt that the position of Respondents here is entirely in accord with the practice of the Copyright Office and with the regulation quoted (R. 25-30).* Moreover, we have the testimony

* The interpretation by the Copyright Office of its own regulation is, of course, controlling. *Bowles* v. *Seminole Rock and Sand,* 325 U.S. 410, 414 (1945).

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of the Register himself that the works here would be registered even if there were some indication of their use as parts of complete lamps (R. 29). Surely, the Court of Appeals for the Seventh Circuit would have reached a different conclusion had it properly construed the regulation of the Copyright Office and considered the long-standing practice of that Office with respect to registration of works of art having useful applications. In any event it is clear that the decision has little weight in relation to the contrary decisions of the Court of Appeals for the Fourth Circuit in the present cause and the Court of Appeals for the Ninth Circuit in *Rosenthal* v. *Stein*, 205 F(2d) 633 (June 26, 1953), both of which were based on a full understanding of the Copyright Office practice.

Perhaps most crucial of all, however, is the misplaced monopoly phobia applied in the *Expert* case. The court relied upon generalities respecting procedural differences and term of design patent and copyright—even considering the comparatively small fee required of the copyright applicant. Nowhere did the court consider—or even mention—the restricted character of the copyright grant and the broad design patent protection which affords a complete monopoly even as against independent inventors. Surely, the court would have concluded otherwise had it realized that all of this emphasis worked contrary to the conclusion reached rather than in support of it.

The *Expert* decision also ignores the history of the Copyright Law and Design Patent Law which shows that the Copyright Law was expanded in 1909 to cover all "works of art" and not just works of fine art.

Even more revealing is the treatment of the *Expert* case by the courts and commentators. We have already noted

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that the case has been rejected by the Court of Appeals in the present cause and by the Court of Appeals in *Rosenthal* v. *Stein,* 205 F(2d) 633, (C.A. 9, June 26, 1953). The writers have been equally critical. Despite a plethora of comment, no one has spoken in support of the *Expert* case. Rather, all agree that utility—or possible utility—is beside the point and that the copyright to a statue is infringed by embodiment of a copy in a lamp. i.e. 27 *Indiana Law Journal,* 130, 134 (1951); 21 *George Washington Law Review,* 353, 366 (1953); 66 *Harvard Law Review,* 877, 884 (1953); 52 *Michigan Law Review* 33, 64, 68 (1953); Derenberg, Copyright No-Man's Land, (1953) *Copyright Problems Analyzed,* (C.C.H.) 215, 238, 246 (also printed at 35 Jl. Pat. Off. Soc. 627).

Moreover, the *Expert* case is distinguishable on its facts. There the District Court stated:

> "* * * In plaintiff's reply brief it is asserted two models of the statuettes, one female and one male, were submitted to the copyright office and these models were in the 'form of lamp bases having the threaded mounting stub to receive a lamp socket'." (96 Fed. Supp. 97)
>
> "It would seem that plaintiff's submission of the statuettes with the lamp mounting stubs to the copyright office was evidence of the practical use to which they were intended to be put. Had it been merely the statuette, use of the statuette thereafter in any practical manner would not remove it from the scope of copyright protection. Having submitted the statuette as a lamp base, thereby limiting the use of the statuette, plaintiff cannot monopolize such use under the copyright statu(t)e. * * *" (96 Fed. Supp. 98)

The Court of Appeals stated:

> "The trial judge held that plaintiffs' submission of the statuettes with the lamp mounting stubs to the

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> Copyright Office was evidence of the practical use to which the statuettes were intended to be put, and that plaintiffs could not monopolize such use under the copyright statute.* * *'' (188 F(2d) 611, 612)

The trial judge later clinched this matter when, after the Court of Appeals decision, he stated:

> "* * * The pertinent feature compelling the court to make the decision of January 23, 1951, was the submission to the copyright office of plaintiff's statuette 'having the threaded mounting to receive a lamp socket' * * *'' (107 Fed. Supp. 60, 61)

The copyrights in issue here were granted upon the basis of specimens submitted in the statue form without lamp mounting stubs (R. 21, Plf. Ex. 1A to 6A and 8, R. 15).* The *Expert* case is thus distinguishable.

The Copyright Law was expanded in 1909 to the broad term "works of art"—the Copyright Office has granted registrations to statuary irrespective of useful application since at least that date—Congress confirmed the Copyright Office practice in the 1947 Copyright Code and in the 1952 Patent Code as well as by leaving the law unchanged for over 40 years. In addition, copyright is a very narrow grant and wholly unlike the broad patent monopoly which is good against subsequent independent creators. Surely, the singular *Expert* decision—which has been rejected by two Courts of Appeal and by all the commentators—should not control the outcome of this cause.

---

* An affidavit in the *Expert* case showed that the deposits were like those in the present case but this affidavit was overlooked by both courts. The decision accordingly stands only as authority for what the courts actually did decide—the case with stubs. "Even if the court * * * misapprehends or mistakes the facts, the conclusion, to be of any value as a precedent, must be taken as applicable to the facts as assumed by the court; * * *." (14 Am. Juris. 289)

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CONCLUSION.

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

WILL FREEMAN,
GEORGE E. FROST,
135 S. LaSalle St.,
Chicago 3, Illinois.

CHARLES F. BARBER,
701 Union Trust Bldg.,
Washington, D.C.

November 24, 1953.

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No. 228

In the Supreme Court of the United States

OCTOBER TERM, 1953

EMANUEL L. MAZER AND WILLIAM ENDICTER, DOING BUSINESS AS JUNE LAMP MANUFACTURING COMPANY, PETITIONERS

v.

BENJAMIN STEIN AND RENA STEIN, DOING BUSINESS AS REGLOR OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE REGISTER OF COPYRIGHTS AS AMICUS CURIAE

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In the Supreme Court of the United States

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EMANUEL L. MAZER AND WILLIAM ENDICTER, DOING BUSINESS AS JUNE LAMP MANUFACTURING COMPANY, PETITIONERS

v.

BENJAMIN STEIN AND RENA STEIN, DOING BUSINESS AS REGLOR OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE REGISTER OF COPYRIGHTS AS AMICUS CURIAE

This Court's order of October 12, 1953, granting the petition for a writ of certiorari, states that "The Solicitor General is invited to file a brief setting forth, along with other matters he deems pertinent, the views of the Copyright Office and a statement of its relevant practice" (R. 87). In accordance with that invitation, this brief is respectfully submitted on behalf of the Register of Copyrights as *amicus curiae*.

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OPINIONS BELOW

The opinion of the District Court for the District of Maryland (R. 57–66) is reported at 111 F. Supp. 359. The opinion of the Court of Appeals for the Fourth Circuit (R. 70–84) is reported at 204 F. 2d 472.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1953 (R. 84). The petition for a writ of certiorari was filed on August 3, 1953, and was granted on October 12, 1953 (R. 87). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the "author" of a sculptured statue is entitled to copyright registration of the statue and to copyright protection against unauthorized copying of the statue by others for use as a statue, or as a lamp base or other article of utility, if, at the time copyright registration is sought, the "author" himself intends to, and subsequently does, use the statue as a lamp base in the manufacturing of lamps.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Copyright Law, the Design Patent Law, and the regulations of the Copyright Office are set forth in Appendix A, *infra,* pp. 48–56.

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STATEMENT

This is one of a number of suits instituted by respondents in several jurisdictions to recover damages from various defendants for alleged copyright infringement. The facts, as disclosed by the record in this case, may be summarized as follows:

Respondents are a family partnership engaged in the business of manufacturing lamps (R. 18). For their lamp bases, respondents utilize original works of sculpture—in the form of human figures and "free forms"—created by respondent Rena Stein (R. 19, 21, 40).[1] These statues are submitted by respondents as statues, without any lamp components added, to the Copyright Office for registration as "works of art" under Section 5 of the Copyright Law (17 U. S. C. 5, Appendix A, *infra,* p. 51 (R. 20, 23).

The statues involved in this case were so submitted to the Copyright Office, and Certificates of Registration were issued (R. 31–37). Thereafter, the statues were sold by respondents throughout the country both as statues and as lamps. The first sales of each copyrighted statue were as lamps rather than as statues only (R. 10–14).

[1] Typically, these statues are created as follows (R. 21): Respondent Rena Stein makes rough pencil sketches of the subject under consideration and then a composite drawing of what she believes is the best of the completed sketches. The resulting composition is sculptured by her in clay on an armature and a mold is prepared from the clay sculpture for casting copies.

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As of November 18, 1952, some 7,440 copies of the six statues here involved were sold with lamp components attached and 10 were sold as statues without lamp parts (R. 10–14). However, according to the testimony of respondent Benjamin Stein, respondents have always had the company policy of offering the statues for sale to the trade as statues (R. 22). And respondents' advertising circular expressly states that "all designs [are] available as statues only, less one-third of price shown." (Pl. Exh. 12, R. 40.)

No question is raised here as to whether the lamps produced and sold by petitioners are unauthorized copies, so far as their bases are concerned, of respondents' copyrighted statues. The Court of Appeals stated: "Beyond any dispute, [petitioners] have meticulously and in minute detail copied every element of the copyrighted statues of the [respondents]." (R. 71).

Petitioners' sole defense is that the copyrights are invalid, and that, if respondents' statues are entitled to any protection against infringement, such protection may be obtained only under the Design Patent Law (R. 4–8).

This defense was sustained by the District Court, which followed the reasoning of the Court of Appeals for the Seventh Circuit in *Stein* v. *Expert Lamp Co.,* 188 F. 2d 611, certiorari denied, 342 U. S. 829, rather than that of the District Court for the Southern District of California in *Stein* v. *Rosenthal,* 103 F. Supp. 227.

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The *Expert Lamp* case was also followed by the District Court for the Eastern District of Michigan in *Stein* v. *Benaderet*, 109 F. Supp. 364—now pending on appeal to the Sixth Circuit.

In support of its holding, the District Court in this case erroneously stated that the *Expert Lamp* decision "is consistent with the long-established practice of the Copyright Office" (R. 63). To correct this interpretation of the practice of the Copyright Office, the Register of Copyrights filed a brief as *amicus curiae* in the Court of Appeals, supporting respondents.

The Court of Appeals reversed, expressly declining to follow the Seventh Circuit (R. 80). Subsequently, the Court of Appeals for the Ninth Circuit also took issue with the Seventh Circuit and affirmed the district court decision in *Stein* v. *Rosenthal, supra. Rosenthal* v. *Stein,* 205 F. 2d 633.

SUMMARY OF ARGUMENT

Respondents' copyright is valid. The fact that the statues are used as lamp bases does not disqualify them as "works of art" and, consequently, does not destroy their copyrightability. Section 202.8 of the Copyright Office's regulations, which contemplates registration of works like respondents', accords with the plain language and history of the Copyright Law and reflects the long-established practice of the Office. The validity of this conclusion is unimpaired by the fact that

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it may lead to cases where an applicant would be eligible for either a copyright or a design patent.

I

Section 5 (g) of the Copyright Law (17 U. S. C. 5 (g), provides in plain terms for copyrighting "works of art; models or designs for works of art." It tortures this language to argue, as petitioners do, that only works of *fine* art—"cultural treasure," unique (not mass-produced) masterpieces, objects of "art for art's sake" devoid of "utility"—were intended to be covered. The language of Section 5 (g) permits of no such restriction; the context—covering "all the writings of an author" (Section 4), and many items (*e. g.*, newspapers, maps, directories) which may be mass-produced (Section 5)—leaves no doubt that "works of art" must be read as it was written. So read, it clearly covers respondents' statues though they are used as lamp bases.

Legislative history confirms this conclusion. The Copyright Law of 1870 authorized registration for copyright of a "statue, statuary, and * * * models or designs intended to be perfected as works of the *fine* arts" (emphasis added). Even under that statute, works like respondents' were, in accord with the apparent understanding of Congress, deemed copyrightable. But the Act of 1909, reenacted in the law in force today, erased any doubt by authorizing copyright of "all the writings of an author" including "works

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of art" and "reproductions of a work of art." The change was neither unconscious nor pointless; it was purposefully designed "as a broader specification than 'works of the fine arts' in the [earlier] statute * * *." Hearings on H. R. 19853, 59th Cong., 1st Sess., p. 11; and see S. Rep. No. 6187, 59th Cong., 2d Sess., p. 11.

II

The Copyright Office, both before and since 1909, has consistently registered items like respondents' statue. See Appendices B and C, *infra,* pp. 57–58. Thus, prior to 1909, articles like electric lamps, clocks, candle and match holders, and stationery cabinets were registered. Similar articles have been copyrighted ever since.

The fact that a work of art possesses utilitarian aspects has not in itself deprived it of its character as a "work of art" which is copyrightable. Of course, purely utilitarian objects which cannot fairly be considered to exhibit artistry—as distinguished from a pleasing or attractive functional design—have been held ineligible. But from Cellini's salt cellar to posters advertising a circus to respondents' statues used as lamp bases, the wide range of products of individual creativeness covered by the phrase "works of art" are eligible for the registration Congress authorized. See Mr. Justice Holmes in *Bleistein* v. *Donaldson Lithographing Co.,* 188 U. S. 239, 250.

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Factors like mass production and commercial exploitation are no more effective to prevent copyrightability than is the fact that an object has utility. Mickey Mouse, pulp magazines, and a host of other examples which might be cited are all produced in quantity for profit. Some or all may miss the marks of uniqueness and creative inspiration for which many would reserve the characterization of "fine art." But none are any the less copyrightable for this. See *Bleistein* v. *Donaldson Lithographing Co., supra,* at 251. For a copyright is not an enrollment in a select national academy. It is a right Congress accorded generally to persons creating, *inter alia,* "works of art"—good or bad, inspired by artistic ideals or by crass hope of gain. And there is no such social interest in fostering the copying of another's creations as would warrant preventing the plagiarism of masterpieces while permitting free duplication of less worthy endeavors.

III

Finding that the plain language and history of the Copyright Law show the copyrightability of respondents' works, the court below saw no occasion to speculate whether respondents would also have been eligible for a design patent and whether the Copyright and Design Patent Laws may be construed as overlapping. But petitioners contend that the decision in effect sanctions such an overlapping. Accepting this premise for the

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sake of argument, we think it clear that petitioners err in supposing (Br. 8, 18–19) that (1) the Copyright and Design Patent Laws "provide generally similar protection" and (2) for this reason, there can be no case where an applicant, at his option, could secure either a design patent or a copyright.

There are, in fact, significant differences in protection between a design patent and a copyright. Because a copyright protects originality rather than novelty and invention, the test for its infringement is whether a copy of the copyrighted work has actually been made. *Alfred Bell & Co. Ltd.* v. *Catalda Fine Arts, Inc.,* 191 F. 2d 99, 103 (C. A. 2). A patent, on the other hand, protects against products similar enough to deceive an observer into thinking them the same, whether or not the infringing items are copies or independently conceived originals. *Gorham Company* v. *White,* 14 Wall. 511, 528.

As a corollary of the lesser protection it affords, a valid copyright may be obtained for a work original with its author, regardless of novelty. *Burrow-Giles Lithographic Co.* v. *Sarony,* 111 U. S. 53, 57–58. A valid patent, on the other hand, calls for a high degree of uniqueness, ingenuity, and inventiveness. *Smith* v. *Whitman Saddle Co.,* 148 U. S. 674, 679. There is, further, a difference in duration—28 years, and renewal for 28 years, for a copyright (17 U. S. C. 24), and three-and-a-half, seven, or fourteen years, in

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the election of the applicant, for a patent (35 U. S. C. 173, as reenacted, 66 Stat. 805).

Recognizing the difference between copyright and design patent protection, courts which have considered the problem have seen no reason to doubt that there are works which may qualify for either. *Louis De Jonge & Co.* v. *Breuker & Kessler Co.*, 182 Fed. 150, 151–152 (C. C. E. D. Pa.), affirmed, 191 Fed. 35 (C. A. 3), affirmed, 235 U. S. 33; *In re Blood,* 23 F. 2d 772 (C. A. D. C.); *Jones Bros. Co.* v. *Underkoffler,* 16 F. Supp. 729 (M. D. Pa.). This does not mean that the creator of such a work may obtain both a copyright and a design patent; he must elect the protection he desires. All that matters here, however, is that, assuming respondents would have been eligible for a design patent, this is no bar to copyright registration.

ARGUMENT

The fundamental question presented by this case is whether the "author"[2] of a sculptured statue may obtain a valid copyright where, at the time copyright registration is sought, the author intends to, and subsequently does, incorporate the statue into an article of utility. Attacking re-

[2] Section 4 of the Copyright Law (17 U. S. C. 4) provides that "the works for which copyright may be secured under this title shall include all the writings of an author." As explained by this Court in *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 57–58, "An author in that sense is 'he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.' Worcester."

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spondents' copyright, petitioners contend that they may with impunity copy the statue without the permission of the author and incorporate it into an article of utility. The Copyright Office is of the opinion that the copyright is valid.

The position of the Copyright Office is set forth in Section 202.8 of the current regulations of the Copyright Office (37 C. F. R., 1949 ed., 202.8). Section 202.8, which was issued on December 22, 1948, prior to the registration of the statues here involved, states in pertinent part as follows (Appendix A, *infra*, pp. 55–56):

> Works of art (Class G)—(a) In general. This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. * * *

The purpose of the regulation is to permit the copyright registration of a work of art regardless of its possible mechanical or utilitarian aspects. As stated by the Register of Copyrights, Arthur Fisher, in his deposition introduced as evidence in this case (R. 25–30), "the phrase 'insofar as their form but not their mechanical or utilitarian aspects are concerned' is interpreted by the office and by our examiners to permit them to deal only with the question of whether the work is a work of artistic craftsmanship, and * * * it is our prac-

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tice to consider as immaterial whether the work may also have a mechanical or utilitarian aspect." (R. 27.) Accordingly, if the particular work is a work of art, it is entitled to copyright registration under the regulation, irrespective of its utility.[3]

Concededly, the regulation does not purport to grant any rights to the mechanical or utilitarian uses of a copyrighted work of art. This is not to say, however, that copyright protection is lost where the work of art is incorporated in a useful article. It is the position of the Copyright Office that a copyright protects the work of art as a work of art without regard to any functional use to which it may be put, and that the subsequent utilization of such a work in an article of utility in no way affects the right of the copyright owner to be protected against infringement of the work of art itself.[4]

Thus, in the instant case, we do not take the position that petitioners may not lawfully pro-

[3] As shown below, pp. 23–34, the Copyright Office does not ignore mechanical or utilitarian aspects where the object is not a work of art. If the work is solely utilitarian in nature, or is a product of the industrial arts whose form is dictated by functional considerations, registration is denied. This qualification, however, does not, in our view, apply in the instant case which concerns a work of art.

[4] See Pogue, *Borderland—Where Copyright And Design Patent Meet*, 52 Mich. L. Rev. 33; Derenberg, *Copyright No-Man's Land: Fringe Rights in Literary and Artistic Property*, 1953 Copyright Problems Analyzed (CCH) p. 215; *Notes*, 66 Harv. L. Rev. 877; 27 Ind. L. Journ. 130; 38 Iowa L. Rev. 334; 21 Geo. Wash. L. Rev. 353; 37 Minn. L. Rev. 212.

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duce and sell an electric lamp whose base is a sculptured statue. Nor do we contend that petitioners may not lawfully produce and sell an electric lamp whose base is an *authorized* copy of the sculptured statues copyrighted by respondents or a copy purchased from respondents. We submit only that the production and sale of an electric lamp whose base is an *unauthorized* copy of respondents' copyrighted statues is an infringement of the copyright. As we view the case, therefore, the issue is not, as petitioners formulate it, whether a design of an electric lamp may be protected as a monopoly by means of copyright registration. Rather, the issue is whether a copyrighted statue may be *copied,* irrespective of its use as a statue or as a component part of an electric lamp or any other article of utility. Petitioners may, in our view, make and sell any lamps they please with any kind of figures or statues as bases, provided only that they refrain from copying and selling statues copyrighted by someone else.

I

SECTION 202.8 OF THE COPYRIGHT OFFICE REGULATIONS IS IN ACCORD WITH THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF THE COPYRIGHT LAW

In this Court, petitioners apparently concede that Section 202.8 of the current regulations per-

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mits the copyright registration of respondents' statues. As noted above, pp. 11–12, Section 202.8 provides for the registration of "works of art" and states that registration is not denied a work of art simply because it possesses mechanical or utilitarian aspects. Petitioners' contention here is that Section 202.8 is not authorized by the Copyright Law, that the Copyright Law, in so far as pertinent, authorizes copyright registration only of "works of fine art." (Pet. Br. 9–10, 19–24.) They urge (Pet. Br. 10, 20) that a mass-produced article cannot be the subject of copyright as a "work of art." Their argument is fallacious and cannot be accepted.

A. STATUTORY LANGUAGE

Petitioners' position is squarely contradicted by the clear and unambiguous language of Section 5 of the Copyright Act (Appendix A, *infra,* pp. 51–52). Section 5 (g) of the Copyright Act of 1947 (61 Stat. 652), which is a reenactment of the Copyright Act of 1909 (35 Stat. 1075), expressly provides for registration of "works of art; models or designs for works of art." 17 U. S. C., Supp. V, 5 (g). And Section 5 (h), which also reenacts the Copyright Act of 1909, similarly provides for registration of "reproductions of a work of art." 17 U. S. C., Supp. V, 5 (h). On its face, Section 5 is not limited to "works of *fine* art," and it neither expressly nor impliedly excludes

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works of art which have utility and may be mass-produced.[5]

The plain words of Section 5 should be given their ordinary and accepted meaning. That the phrase "works of art" is commonly understood to have a broader meaning than "works of fine art" is shown by their dictionary definitions. "Art" is the "application of skill and taste to production according to aesthetic principles * * * application to the production of beauty in plastic materials by imitation or design, as in painting and sculpture * * * that which is produced, as paintings, sculpture, etc., by the application of skill and taste." Webster, *New International Dictionary* (2nd ed.) p. 155. "Fine art" is "art which is concerned with the creation of objects of imagination and taste for their own sake and without relation to the utility of the object produced." *Id.* at 949.

And the broader scope of the phrase "works of art" has been recognized by this Court. In *United States* v. *Perry,* 146 U. S. 71, 74–75, the Court pointed out that "works of art may be divided into four classes: 1. The fine arts, properly so called, intended solely for ornamental purposes * * *. 2. Minor objects of art, intended also for ornamental purposes * * * [which] are

[5] That the mass production argument is groundless is seen from the fact that millions of copies of books, paintings, etc., have been under copyright protection for years, and there has never been any court decision implying that only the original is protected. See also note 13, *infra*, pp. 31–32.

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susceptible of an indefinite reproduction from the original. 3. Objects of art, which serve primarily an ornamental, and incidentally a useful, purpose * * *. 4. Objects primarily designed for a useful purpose, but made ornamental to please the eye and gratify the taste, such as ornamented clocks * * *."

Petitioners' brief itself vigorously asserts the distinction between "works of art" and "works of fine art." In arguing that only "works of fine art" are protected by the Copyright Law, petitioners state that "works of fine art have always been restricted to *original* painting, statue and sculpture having no utility, created solely for the sake of art" (Pet. Br. 20), that "the definition and understanding of 'works of fine art' requires that the work have artistic value only and be free of any practical utility" (Pet. Br. 10), and that this conception "precludes the mechanical duplication of the original form of the work of fine art" (*ibid.*).

But petitioners' effort to exclude objects having, or incorporated in articles having, utility from the category of "works of art" registrable under 17 U. S. C. 5 (g) not only requires a misreading of this specific subsection's language; it requires, in addition, that the context of the subsection be ignored. Section 4 expressly provides that the subject-matter of copyright "shall include all the writings of an author." 17 U. S. C. 4. And the classes of copyrightable materials listed in Section

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5 as a whole (Appendix A, *infra*, pp. 51–52)—a listing Congress declared "shall not be held to limit the subject matter of copyright" (*infra*, p. 52)—shows no such animus against utility as petitioners assume. The subsections include directories, gazeteers, and other compilations; newspapers; lectures, sermons, and addresses; maps; drawings or plastic works of a scientific or technical nature; and photographs. Conjoined with such items, which frequently combine utility with limited aesthetic pretensions, the category of "works of art" invites no strained contraction to include only *fine* art. Properly read as it was written, the phrase includes respondents' statues, whatever their artistic merit and however much their use as lamp bases may, by the standard of "art for art's sake", qualify their role as "pure" or "fine" art.

B. LEGISLATIVE HISTORY

Accordingly, unless it is to be assumed that Congress employed the phrase "works of art" in a sense far narrower than its ordinary meaning, Section 202.8 of the regulations of the Copyright Office is fully authorized by the statutory language and is in accord with its purpose. The evolution of the language convincingly demonstrates that the Congressional choice of words was deliberate and not unintentional.

Prior to 1870, the Copyright Law afforded no protection either to works of fine art or to works

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of art. In so far as statues are concerned, protection was conferred by the Design Patent Act of 1842 (Sec. 3, 5 Stat. 543, 544) upon "any new and original design for a manufacture," *"any new and original design for a bust, statue, or bas relief or composition in alto or basso relievo,"* or "any new and original shape or configuration of any article of manufacture." (Appendix A, *infra,* pp. 52–53, emphasis added). As amended in 1870, both the Design Patent Law and the Copyright Law provided protection for statues. The Design Patent Act of 1870 extended to a "new and original design for a manufacture, bust, *statue,* alto-relievo, or bas-relief" or "any new, useful, and original shape or configuration of any article of manufacture." (Sec. 71, 16 Stat. 198, 210, Appendix A, *infra,* p. 53, emphasis added.) The Copyright Law of 1870, however, was limited to a "statue, statuary, and * * * models or designs intended to be perfected as works of the *fine* arts" (Sec. 86, 16 Stat. 198, 212, Appendix A, *infra,* p. 48, emphasis added). In 1902, the specific enumeration of the subjects of design patent was eliminated, and the Design Patent Law was amended to cover broadly "any new, original, and ornamental design for an article of manufacture." (32 Stat. 193, Appendix A, *infra,* pp. 53–54.)[6] In 1909, the present language of the

[6] Prior to this amendment, utility was a relevant consideration in the issuance of a design patent. Compare *Smith* v. *Whitman Saddle Co.*, 148 U. S. 674, 678, with *Gorham Company* v. *White*, 14 Wall. 511. Cf. Pet. Br. 27.

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Copyright Law was adopted, permitting the registration of "all the writings of an author" including "*works of art;* models or designs for *works of art;* reproductions of a *work of art.*" (Secs. 4, 5, 35 Stat. 1075, 1076–1077, Appendix A, *infra,* pp. 49–50, emphasis added.)

As this summary of the history of the Copyright and Design Patent Laws reveals, a duplication in coverage with respect to statuary has existed since 1870. During the period 1870–1909, the duplication was narrower than that which presently exists, protection under the Copyright Law being limited to statuary "intended to be perfected as works of the fine arts." With the broadening of the Copyright Law in 1909 to include "works of art" generally, statuary is now protected by copyright registration if it is a work of art, irrespective of its utility (cf. *Jones Bros. Co.* v. *Underkoffler,* 16 F. Supp. 729 (M. D. Pa.)), and it is protected by design patent if it is "new, original, and ornamental."

That the substitution of "works of art" for "works of fine art" in the 1909 Act was intended to broaden the scope of the Copyright Law—and was not, as petitioners assert (Pet. Br. 9–10), merely the elimination of a superfluous word—is clearly shown by the legislative history of that Act. The Copyright Office and the Library of Congress actively participated in the drafting of the bill which ultimately became the 1909 Act. See Hearings before Committee on Patents, House

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of Representatives, conjointly with Senate Committee on Patents, on H. R. 19853, 59th Cong., 1st Sess., June 6–9, 1906, p. 6. With respect to this change in language, the Librarian of Congress[7] expressly advised the House and Senate Committees as follows (Hearings, *supra,* p. 11):

> The bill contains only the general statement that the subject-matter is to include "all the works of an author," leaving the term "author" to be as broad as the Constitution intended; and, as you know, the courts have followed Congress in construing it to include the originator in the broadest sense, just as they have held "writings," as used in the Constitution, to include not merely literary but artistic productions.
>
> After this general statement certain specifications follow in the bill of particular classes under which a particular application is to be made in the office, but these specifications are coupled with the proviso that they shall not be held to limit the subject-matter. The specifications so far as possible also substitute general terms for particulars. They omit, for instance, the terms "engravings, cuts, lithographs, painting, chromo, statues and statuary." They assume, however, that all of these articles will be included under the more

[7] The Copyright Office was then, and is now, part of the Library of Congress and under the direction and supervision of the Librarian of Congress. See 17 U. S. C. A. 201, Historical Note.

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> general terms, as "prints and pictorial illustrations" or "reproductions of a work of art" or "works of art" or "models or designs for works of art." *The term "works of art" is deliberately intended as a broader specification than "works of the fine arts" in the present statute with the idea that there is subject-matter (for instance, of applied design, not yet within the province of design patents), which may properly be entitled to protection under the copyright law.* [Emphasis added.]

In the light of this express statement of the reason for the change in language, petitioners' claim that the 1909 Act is still restricted to works of fine art is footless. The testimony of the Librarian of Congress is enough to preclude any inference that Congress adopted the changed language unwittingly. And there is other evidence that Congress was not unconscious of the difference between "works of art" and "works of fine art." The Senate Report on a predecessor bill of the one which became the 1909 Act, following the hearings we have cited, expressly referred to the listed category of "works of art" as a *new designation,* and pointed out, in addition, that "'models or designs intended to be perfected as works of the *fine* arts' is changed to 'models or design for works of art.'" S. Rep. No. 6187, 59th Cong., 2d sess., p. 11 (latter emphasis added). That Congress was fully aware of the

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distinction is shown, moreover, by Section 3 of the Copyright Act of 1874 (18 Stat. 78, 79, Appendix A, *infra,* pp. 48–49) which provided that the "words 'Engraving', 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office."

It may be suggested, indeed, that even when the Copyright Law (before 1909) referred to "works of *fine* art," Congress understood it to cover a broader area than petitioners find covered today—an area including the statuary involved here. See pp. 27, 30, *infra.* That articles serving a useful as well as ornamental purpose could be registered under the earlier law is disclosed by an 1882 amendment, which authorized "manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright [to] put the copyright mark * * * upon the back or bottom of such articles * * *." 22 Stat. 181 (Appendix A, *infra,* p. 49). That enactment, according with common knowledge, belies petitioners' suggestion that a copyright is (or ever was) available only to protect a "cultural treasure" (Pet. Br. 9).

We think it clear, in a word, that when it authorized copyrights for "works of art" Congress meant what it said. And that authorization

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plainly extends to the statues created by the respondents and copied by the petitioners.

II

SECTION 202.8 OF THE COPYRIGHT OFFICE REGULATIONS IS CONSISTENT WITH THE ESTABLISHED PRACTICE OF THE COPYRIGHT OFFICE SINCE 1909

The Copyright Office is not a judicial body and cannot adjudicate the validity of copyright claims submitted to it for registration. That ultimate determination rests with the courts. Assuming that all the procedural requirements of the law and regulations are met, the Copyright Office cannot refuse to register a claim to copyright in any work if the work is subject to copyright under the law. The Copyright Office can, however, refuse to register claims to works not within the contemplation of the statute. Cf. *King Features Syndicate, Inc.* v. *Bouvé,* 48 U. S. P. Q. 237 (D. D. C.); *Bouvé* v. *Twentieth Century-Fox Film Corp.,* 122 F. 2d 51 (C. A. D. C.).

Accordingly, if the procedural requirements of the Copyright Law and administrative regulations are met, the Copyright Office must decide, initially, whether the alleged art work comes within the statutory categories of "works of art; models or designs for works of art; [or] reproductions of a work of art." See 28 Ops. A. G. 557. In the absence of any controlling judicial definition, the Copyright Office has proceeded along what it considers to be a very conservative

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path in reaching such decisions. In fact, text writers have suggested that the Office should be more liberal in its views in this regard. Weil, *The Copyright Law,* 214 (1917); Ladas, *International Protection of Literary and Artistic Property,* 716 (1938).

The regulations here in issue form a part of these conservative standards used by the Office in deciding whether to issue a copyright.

Petitioners contend, however, that in 1948, when the present regulation (Section 202.8) was issued, the Copyright Office "perverted" the law and improperly enlarged the class of "works of art" eligible for registration (Pet. Br. 33). Arguing that, despite the plain language of the 1909 Act, the Copyright Law is restricted to "works of fine art,"[8] petitioners assert that the Copyright Office so interpreted the Act from 1909 until 1948. In support of this argument, they rely on the language of the pre-1948 regulations. Their reliance, we submit, is misplaced. The fact is that the Copyright Office has consistently since 1909—and even before then—registered works like the ones in this case, following the clearly stated mandate of Congress.

1. As amended in 1917, Section 12 of the 1910 Regulations, which remained substantially unchanged until 1948, read as follows:[9]

[8] We have answered this contention in Point I of this brief, *supra*, pp. 13–23.

[9] As originally promulgated in 1910 this Regulation read: "Works of art.—This term includes all works belonging

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Works of art and models or designs for works of art.—This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

The protection of productions of the industrial arts, utilitarian in purpose and character, even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

Toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, laces, woven fabrics, or similar articles are examples. The exclusive right to make and sell such articles should not be sought by copyright registration.

This regulation was superseded in 1948 because it did not explicitly reflect the established practice of the Copyright Office. It defined only the extremes of permissible and nonpermissible registration, leaving in doubt the works which fall

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fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

"Productions of the industrial arts utilitarian in purpose and character are not subject to copyright registration, even if artistically made or ornamented.

"No copyright exists on toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or any similar articles."

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in between. Thus, the regulation stated that the term "works of art" "*includes*" all works belonging fairly to the so-called fine arts but not "productions of the industrial arts, utilitarian in purpose and character * * *." It made no reference to articles which might fairly be considered works of art although they might also serve a useful purpose. As the registrations granted by the Copyright Office since 1909 demonstrate, the regulation was not intended to exclude such works of art. For the convenience of the Court, we have set forth in Appendix B, *infra,* pp. 57–64, typical examples from the Catalog of Copyright Entries for the period 1912 to 1952—selected at approximately five-year intervals—showing registrations of works of art possessing utilitarian aspects.

It has been the consistent practice of the Copyright Office since 1909 to refuse copyright registration only to those works of a strictly utilitarian nature which could not be called "works of art" although they might possess pleasing design. Thus, registration has been refused for pleasing or attractive functional designs for refrigerators, clocks, stoves, gasoline pumps, and oil dispensers on the ground that protection for such works must be considered under the Design Patent Law.[10] However, a work which was of itself an

[10] Contrary to petitioners' assumption, the items reproduced from the Catalog of Copyright Entries on p. 33 of their brief were not of this category. The items referred to

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artistic conception in the category of the standard art media—sculpture, painting, etc.,—was not denied registration merely because it could be put to a useful purpose.

It should be observed that this was the practice even under the more restrictive law prior to 1909. As shown by the photographs reproduced in Appendix C of this brief, *infra,* pp. 66–78, articles registered in that period included works of sculpture intended for use as *electric lamps*, magazine racks, clocks, candle and match holders, and stationery cabinets.

Under the 1910 and 1917 Regulations, registration was granted for stained glass windows, bas-relief bronze doors, sculptures embodied in book-ends, candlestick holders, sanctuary lamps, and the like.[11] Similarly, artistic works of less aesthetic,

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were in fact registered as works of art, models or designs for works of art. With but a single exception, the works consisted of drawings or photographs of works which fall within the classic art form of paintings or drawings, albeit many may doubt the merit of their art. No hats, game boards, belt buckles, or lampshades were deposited. It is clear, then, from the very instances petitioners cite that all that is protected is the drawing or other identifying reproduction. *Baker* v. *Selden*, 101 U. S. 99, 102–103; *Muller* v. *Triborough Bridge Authority*, 43 F. Supp. 298 (S. D. N. Y.); *Fulmer* v. *United States*, 103 F. Supp. 1021 (C. Cls.).

The sole exception was GP 6079, which was a colorful plaster pig with a coin slot in its back, to be used as a bank. This, of course, falls within the class of artistic works which, however debatable their aesthetic merit, are clearly artistic in conception and have wide popular appeal. See pp. 27–28, *infra.*

[11] For example, the 1910 Catalog of Copyright Entries (which is required to be published by 17 U. S. C., Supp. V,

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but perhaps more popular appeal, such as reproductions of Mickey Mouse, Donald Duck, cocker spaniels (cf. *Woolworth Co.* v. *Contemporary Arts,* 344 U. S. 228), greyhound dogs, and grotesque pigs, also have been granted registration notwithstanding their possible and potential use as toys for children, paperweights, automobile radiator caps, or savings banks.

2. Art, in its broadest sense, may be conceived to be a matter of individual taste or preference which does not depend upon public acceptance. The Copyright Office, however, does not generally accept the subjective preference of every copyright claimant as the test of registrability. The theories upon which it has granted copyrights for "works of art," as described in the preceding section of this Point, are as follows:

Historically, paintings, statues, sculpture, etchings, and the like have always been regarded as

210) discloses registration of the following: (1) *Altar Candle Stick*—Ornamental vase resting on 6 claws and showing cross in relief on 2 sides, fluted stem with 3 cherub heads supporting top. Registration No. G–36140; (2) *Sanctuary Lamp Model*—Three chains suspended from ornamental top holding lamp ornamented by two angels in attitude of prayer. Registration No. G–36146; (3) *Set of Dishes For Tabernacle Service*—Circular design, small oval in border containing monogram and Hebrew characters, sprays of hoshanas, branch with fruit above oval. Registration No. G–35081; (4) *Sundial*, motto "Speedwell"—Face of sundial with fancy border. Registration No. G–31799; (5) *Egyptian Jardinere*—Large bowl held upon the back of three lions, near top elephants' heads, potted with plants. Registration No. G–32062.

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works of the fine arts. Like most human efforts, these works can be the achievement of genius or the result of mere amateurish feeling for expression. The Copyright Office accepts for registration all such works regardless of their excellence or lack of merit.[12] As Mr. Justice Holmes pointed out in *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 250:

> Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

Where the work, strictly speaking, does not lie within the historical concept of the fine arts, but is closely allied thereto—as is the case with jewelry, enamels, glassware and tapestry—the Office will reject an application only if a reasonable man might say that there was an entire absence of artistic craftsmanship notwithstanding the presence of pleasing functional design. For example, the Office has registered some claims to copyright in jewelry, the most notable illustration probably being that created by the contemporary artist, Salvador Dali. This jewelry constituted three-dimensional representations of

[12] See p. C of petitioners' Appendix, reprinting article on Copyrighting Jewelry by the former Register of Copyrights, Sam B. Warner.

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some of the well-known objects from paintings by Mr. Dali, such as limp watches, staring eyes, driftwood, etc., in the form of earrings, brooches and a necklace.

As noted above, works which are ornamental and intended primarily to serve an ornamental purpose, but which may incidentally serve a useful purpose, are also copyrightable. Pictorial stained-glass windows, bronze bas-relief doors, sculptured candleholders, and similar items fall within this class. As shown in Appendices B and C, *infra,* pp. 57–58, registrations made both before and after 1909 include works of this category. They are in essence artistic, and the incidental useful purpose is inherent in the object of the art form.

It is, in short, no bar to eligibility for copyright that an object which is made in an ornamental and artistic fashion is designed as, or as part of, an article of utility. Utility in itself is in no way incompatible with art. For example, Appendix C, *infra,* pp. 66–78, contains a photograph of a bas-relief bronze clock, which was registered prior to 1909. It cannot reasonably be said that such a work should be denied the protection of the Copyright Law solely because, like the Cellini salt cellar, it serves a useful purpose. The work of art remains a work of art notwithstanding its utilitarian features.[13]

[13] The fact that the Cellini salt cellar may have been originally produced in a single copy for a noble patron rather than

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Not to be confused with this category is the class of works which are solely utilitarian in nature, or which may be said to be products of the industrial arts, whose form is dictated by functional considerations. Examples of this class would include such things as bicycle pumps, watch cases, refrigerators, automobile bodies, lawn mowers, and spectacle cases. A pleasing design or configuration of these types of work is generally attributable primarily to the functional use for

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in multiple copies for the multitudes would appear immaterial. Cf. Pet. Br. 42. Literary works which in an earlier era would perhaps have been reproduced by hand on illuminated parchment or in other single copies have not become less copyrightable by virtue of their present reproduction in thousands of copies by manufacturing techniques involving the use of movable type, plates, etc. Similarly, painting masterpieces once produced chiefly on canvas or as murals in single copies are now frequently reproduced in color plates for distribution in thousands of individual copies or in periodical or book form. Neither the mechanical and manufacturing processes used in this reproduction, the number of copies, the materials used, nor the association of the work of art with some useful purpose would appear to affect the copyrightability or essential nature of the work itself. What is copyrighted as the writings of an author, whether in their literary or artistic aspects, is the intangible property, not the physical materials of which it is made or the use to which it is put. The Venus de Milo remains no less a work of art if reproduced in marble for exhibition in a gallery, in porcelain on a family mantlepiece, as part of a salt cellar for table use, or as part of a lamp in a sitting-room. And what is true of the sculpture of the greatest of artists would appear equally true of the works of lesser sculptors, the quality of the work and the reputation of the author being as immaterial as whether the work itself may be seen only in a public gallery or in the humblest home.

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which the article is intended. It is the position of the Copyright Office that no matter how pleasing the design, for example, of the body of the Studebaker automobile which was created by a famous industrial designer, such design is solely related to its functional purpose and, therefore, lies outside the field of copyright protection.

3. In making its determinations, the Copyright Office does not take into consideration the possible commercial exploitation of the work submitted for registration. Nothing in the language or history of the Copyright Law suggests that copyright protection should be denied because the work of art has commercial value. See *supra,* pp. 14–23. Even works of fine art, which presumably are created for their own sake without relation to utility, may serve a profitable purpose. If they served no such purpose, copyright registration would be of little more than theoretical value to their author. Presumably, registration is obtained because the author wishes to secure for himself "the exclusive right * * * To print, reprint, publish, copy, and vend the copyrighted work * * *." 17 U. S. C. 1 (a).

As Mr. Justice Holmes observed in *Bleistein* v. *Donaldson Lithographing Co.,* 188 U. S. 239, 251, holding certain illustrations copyrightable although of no intrinsic value other than as circus posters, "Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives

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them a real use—if use means to increase trade and to help to make money. *A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement.* * * * the special adaptation of these pictures to the advertisement of the Wallace shows does not prevent a copyright." (Emphasis added.) Similarly here, respondents' statues are none the less works of art because they may serve as lamp bases, creating a combination of aesthetic appeal and utility for which many people appear willing to pay and which petitioners deemed it profitable to copy.

Moreover, to deny copyright registration because of possible commercial exploitation of the work of art would be to make copyright protection turn upon the applicant's subjective intent at the time of application, or upon a later change in that intent. The impossibility of this test was clearly stated in *Stein* v. *Rosenthal,* 103 F. Supp. 227, 231 (S. D. Cal.), affirmed, 205 F. 2d 633 (C. A. 9):

> Having qualified for registration by reason of its purely artistic character, the question presented is whether an intent on the part of the claimant to copy such protected sculpture in such a way as to artistically enhance some separate and utilitarian article of manufacture destroys the right to copyright. The argument that this is so is but another vehicle to carry defendants' philosophy that if the artist intends

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> to profit by his creation he cannot acquire protection. *To uphold this argument would be to require the Judicial inquiry to plumb the mind of every copyright proprietor and determine his plans and intentions as of the time of registration. This impossibility is not contemplated by the Statute.*" [Emphasis added.]

This observation is plainly applicable to the administrative inquiry as well. The test of copyrightability proposed by petitioners is both unsound and unworkable.

In sum, it is apparent from a review of the established practice of the Copyright Office that Section 202.8 of the current regulations is consistent with, rather than contrary to, the Copyright Office's long-standing interpretation of the 1909 Copyright Act. Petitioners' assertion that Section 202.8 is an attempt to enlarge the field of operations of the Copyright Office "in a clear encroachment upon the field of operation of the Patent Office" (Pet. Br. 11) is baseless.

III

THE AVAILABILITY OF DESIGN PATENT PROTECTION DOES NOT PRECLUDE COPYRIGHT REGISTRATION

The court below (R. 83–84) found it unnecessary to decide whether there is an area of overlap between the Copyright and Design Patent Laws—"in other words, [whether] there is a field in which an applicant, at his option, could secure

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either a copyright or a design patent" (R. 83). The court said (R. 84):

> All that we hold, and all that we need hold, is that the copyrights of the statuettes granted to plaintiffs [respondents] were valid, even though plaintiffs intended primarily to use these statuettes in the form of lamp bases and did so use them, and that these copyrights were clearly infringed by defendants, who minutely copied these statuettes in the form of bases for lamps. * * *

Petitioners contend, however—implicitly assuming that respondents' statues would be eligible for a design patent—that the effect of the decision below is to permit an overlapping of the Copyright and Design Patent Laws. They argue that these laws must be construed to be "contiguous," never overlapping (Pet. Br. 14). And they urge (Br. 19) that under a contrary view "the Design Patent Laws become a dead letter."

It may be noted at the outset that there is no provision in the pertinent statutes to support the position that overlapping is forbidden. It is to be recalled, moreover, that, as we have shown in Points I and II, the decision below clearly accords with the language and history of the Copyright Law and the established practice of the Copyright Office thereunder. There is solid ground, therefore, for the view that this Court, like the court below, has no occasion to reach the broad issue petitioners pose.

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But to meet their argument squarely, we think it clear that petitioners are mistaken. The contention that an applicant potentially eligible for a design patent may never obtain a copyright rests upon the erroneous premise that the Copyright Law and the Design Patent Law "provide generally similar protection" (Pet. Br. 8, 18–19). In fact, there are significant differences in the scope of the protection the two laws afford. Recognizing this, the courts which have encountered the problem have concluded (see pp. 41–46, *infra*) that there is a category of works for which either copyright or design patent protection may be available.[14]

1. Unlike a patent, a copyright gives no exclusive right to the art disclosed by the copyright or to the use of the art. The Copyright Law protects only the expression of an idea; it does not protect the idea itself. *Baker* v. *Selden,* 101 U. S. 99; *F. W. Woolworth Co.* v. *Contemporary Arts,* 193 F. 2d 162, 164 (C. A. 1), affirmed, 344 U. S. 228; *Ansehl* v. *Puritan Pharmaceutical Co.*, 61 F. 2d 131 (C. A. 8); *Fulmer* v. *United States,* 103 F. Supp. 1021 (C. Cls.); *Muller* v. *Triborough Bridge Authority,* 43 F. Supp. 298 (S. D. N. Y.). For example, if a book disclosing a formula for a medicine is copyrighted, others may not copy the book, but they may use the formula—the

[14] We are advised, in this connection, that the Patent Office agrees with the conclusion of the Copyright Office that the copyright of the respondents in this case is valid.

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idea. A patent, on the other hand, would protect the idea by conferring an exclusive right to manufacture and sell the medicine made according to the formula. *Baker* v. *Selden, supra*, at 102–103.

Since a copyright is intended to protect authorship, the essence of copyright protection is the protection of originality rather than novelty or invention. *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 249–250; *Baker* v. *Selden, supra* at 102, 104. For this reason, the test for copyright infringement is whether the second work is an original and independent treatment of the subject, or is a copy more or less servile of the first work. *Pellegrini* v. *Allegrini*, 2 F. 2d 610 (E. D. Pa.); *Alfred Bell & Co. Ltd.* v. *Catalda Fine Arts, Inc.*, 191 F. 2d 99, 103 (C. A. 2); *Ansehl* v. *Puritan Pharmaceutical Co.*, 61 F. 2d 131 (C. A. 8); *Christie* v. *Cohan*, 154 F. 2d 827 (C. A. 2), certiorari denied, 329 U. S. 734. On the other hand, the test for infringement of a design patent is whether "in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other * * *." *Gorham Company* v. *White*, 14 Wall. 511, 528. As the Court of Appeals for the Second Circuit recently pointed out in *Alfred Bell & Co. Ltd.* v. *Catalda Fine Arts, Inc., supra* at 103:

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> * * * "independent reproduction of a copyrighted * * * work is not infringement," whereas it is *vis a vis* a patent. Correlative with the greater immunity of a patentee is the doctrine of anticipation which does not apply to copyrights: The alleged inventor is chargeable with full knowledge of all the prior art, although in fact he may be utterly ignorant of it. The "author" is entitled to a copyright if he independently contrived a work completely identical with what went before; similarly, although he obtains a valid copyright, he has no right to prevent another from publishing a work identical with his, if not copied from his. A patentee, unlike a copyrightee, must not merely produce something "original"; he must also be "the first inventor or discoverer." "Hence it is possible to have a plurality of valid copyrights directed to closely identical or even identical works. Moreover, none of them, if independently arrived at without copying, will constitute an infringement of the copyright of the others."

Because of these differences in the scope of the protection granted by the Copyright and Design Patent Laws, the two differ in additional important respects:—(1). The standards for obtaining copyright protection are of a lower order than those required for design patents. A copyright may be registered if the particular work is "original," *i. e.,* if it owes its origin to the author. *Burrow-Giles Lithographic Co.* v. *Sarony,* 111

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U. S. 53, 57–58. It is "valid without regard to the novelty, or want of novelty, of its subject-matter." *Baker* v. *Selden, supra* at 102. Correlative with the greater immunity of a patentee is the requirement that a design patent may be obtained only for a "new, original and ornamental design for an article of manufacture." 35 U. S. C. 171, as reenacted, 66 Stat. 805 (Appendix A, *infra,* p. 54). To be valid, a patent must disclose a high degree of uniqueness, ingenuity, and inventiveness. *Smith* v. *Whitman Saddle Co.,* 148 U. S. 674, 679; *Alfred Bell & Co. Ltd.* v. *Catalda Fine Arts, supra; In re Faustmann,* 155 F. 2d 388 (C. C. P. A.). (2). The duration of a copyright is initially twenty-eight years from the date of first publication and may be renewed for an additional twenty-eight years (17 U. S. C. 24),[15] whereas design patents are granted for the term

[15] In presenting its draft of the bill which subsequently became the Copyright Act of 1909, the Copyright Office, speaking through the Librarian of Congress, Herbert Putnam, advised the Congress as follows: "The third suggestion is that a common disposition to question a long term for copyright, on the ground that a short term suffices for patents, is based upon false analogy. Literary and artistic productions and useful inventions may be equally the creations of the mind, and they are coupled in the Constitution; but they are coupled, it is pointed out, only as deserving protection. Their character, and the duration of the protection required by each, may be very different. It is alleged to be very different. The monopoly is different; the returns to the creator are different, and the interests of the public are different in the two cases. The monopoly by patent in an invention is a complete monopoly of the idea. The monopoly by copyright in a literary or artistic work is a monopoly

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of three-and-a-half years, seven years, or fourteen years in the election of the applicant. 35 U. S. C. 173, as reenacted, 66 Stat. 805.

It is thus apparent that the protection accorded by the Copyright Law is significantly different from that of the Design Patent Law. If the respondents had obtained design patents for their statues, they would have had a monopoly—during the term of the patent—of the production and sale of electric lamps whose bases are such statues. See 35 U. S. C. 289, as reenacted, 66 Stat. 813 (Appendix A, *infra,* pp. 54–55). Their patents would have been infringed by the production and sale of electric lamps whose bases are statues which, in the eyes of an ordinary observer, are of substantially the same design. The protection which the respondents obtained from their copyright registration, however, is only the exclusive right—during the term of the copyright—to be protected from the unauthorized copying of

merely of the particular expression of the idea. The inventor's exclusive control of his idea, it is said, may bar innumerable other inventions, applications of his idea, of importance to the public, while the author's or artist's exclusive control of his particular expression bars no one except the mere reproducer. The returns to an inventor are apt to be quick; the returns to an author are apt to be slow, and the slower in proportion to the serious character of his book, if a book. The returns to a successful inventor are apt to be large; the returns to even a successful author or artist are not apt to be more than moderate." Hearings Before Committee on Patents, House of Representatives, conjointly with Senate Committee on Patents, on H. R. 19853, 59th Cong., 1st Sess., June 6–9, 1906, pp. 12–13.

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their statues.[16] They did not obtain a monopoly of the production and sale of electric lamps whose bases are statues, of independent creation, similar to but not copies of their copyrighted statues. Nor did respondents obtain a monopoly of the production and sale of electric lamps whose bases are identical authorized copies of theirs. Others remain wholly free to utilize copies of the statues in any manner they see fit, provided that such copies are purchased from respondents or authorized assignees of the copyright. The grant of this limited protection under the Copyright Law does not make a "dead letter" of the Design Patent Law.

2. Contrary to petitioners' view, judicial decisions have several times recognized that there are works which may qualify for either copyright or

[16] Section 1 of the Copyright Law grants to the copyright owner only "the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work; * * *." (17 U. S. C. 1 (a)). Accordingly, copyright protection of the statues could not extend to any other portion of the lamp. Section 3 of the Act makes this clear by providing that "the copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted." (17 U. S. C. 3, Appendix A, *infra*, pp. 50–51.) Cf. *Eggers* v. *Sun Sales Corp.*, 263 Fed. 373 (C. A. 2). Here, the copyrightable component of the work copyrighted was the statue. The addition of non-copyrightable lamp fixtures would not change the scope of copyright protection even if the work had been so submitted for registration. In either case, it is the statue only which is entitled to copyright protection, and, as we have shown, there is no justification for holding that such protection is lost if the statue is commercially exploited by the addition of non-copyrightable matter.

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design patent protection. In *Louis De Jonge & Co. v. Breuker & Kessler Co.,* 182 Fed. 150 (C. C. E. D. Pa.), affirmed, 191 Fed. 35 (C. A. 3), affirmed, 235 U. S. 33, the question was the copyrightability of an artistic painting which was intended to be used as a design for fancy wrapping paper. Relief against infringement was denied for failure of compliance with the statutory requirements governing the application of the copyright notice. As to the question here involved, which was not reached on appeal, the district court declared (182 Fed. at 151–152):

> It is, I think, difficult to see how a painting that may be either copyrighted or patented can be said to be "designed" for one rather than for the other form of protection until the author or owner makes his final choice. Up to that time he may do what he pleases with his property. If he chooses to copyright it as a work of art, he may do so; if he prefers to patent it as a design, he is free to do this also; and the mere fact that he originally intended to take one of these courses rather than the other does not prevent him from changing his purpose at the last moment. His state of mind upon this matter has nothing to do with the quality of the painting; and it is this quality, and not the intention of the author or owner, that determines what protection may be given to the artist's work.

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> * * * Since it was qualified for admission into the two statutory classes, I see no reason why it might not be placed in either. But it could not enter both. The method of procedure, the term of protection, and the penalties for infringement, are so different that the author or owner of a painting that is eligible for both classes must decide to which region of intellectual effort the work is to be assigned, and he must abide by the decision.

The rationale of the *De Jonge* case was adopted by the Court of Appeals for the District of Columbia Circuit in *In re Blood*, 23 F. 2d 772. In that case, a copyright had been obtained for a label, and the owner subsequently attempted to obtain a design patent for the same label. The Patent Office rejected the latter application on the ground that copyright had already been obtained.[17] Affirming the Commissioner of Patents, the Court of Appeals pointed out (p. 772):

> The design is not entitled to double registration, once as a label design [copyright], and again as a design for a hosiery ticket [design patent.] Such a course would result for all practical purposes in an extension of the design monopoly. *The applicant was entitled to apply for a patent for the design as a hosiery label, or he might complete the label, and*

[17] At that time, the copyright registration of commercial prints and labels was administered by the Patent Office. In 1940, such jurisdiction was transferred to the Copyright Office (Act of July 31, 1939, 53 Stat. 1142, 17 U. S. C. 64).

, 17 U. S. C., Supp. IV, 6

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> *register the design, so completed, as a label.* He could not do both. He elected to pursue the latter course, and has obtained the protection thereby assured to him, and he is bound by that election. [Emphasis added.] [18]

In *Jones Bros. Co.* v. *Underkoffler,* 16 F. Supp. 729 (M. D. Pa.), the alleged infringer of plaintiff's copyrighted design for a cemetery memorial contended that the memorial was not copyrightable as a work of art but should have been patented as a design for an article of manufacture. Rejecting this argument, the court observed that (p. 730):

> It is apparent that under the above definitions of manufacture and art a certain object may be an article of manufacture as well as a work of art and the design therefor might well come under the De-

[18] The *Blood* case is further significant in that it reveals the identity of opinion of the Patent Office and the Copyright Office as to the partial overlapping of the Design Patent and Copyright Laws. Cf. footnote 14, *supra*, p. 36. That identity of opinion and practice has continued to the present. Both the *De Jonge* and *Blood* cases were recently relied upon by the Patent Office and the Patent Office Board of Appeals in denying a design patent application where copyright had already been obtained on the same work. In the Government's brief before the Court of Customs and Patent Appeals, the same cases were cited to sustain the position of the Patent Office. See Briefs and Transcript of Record, Patent Appeal Docket No. 5967, *In the Matter of the Application of Lurelle Guild*, 98 USPQ 68. The court found it unnecessary, however, to determine whether a copyright holder may later obtain a patent on the same article.

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> sign Patent Law as a design for an article of manufacture or under the Copyright Act as a design for a work of art.

And, citing the *De Jonge* case with approval, the court further stated (p. 731):

> In a case which comes under either statute, it becomes a matter of choice by the author or owner whether he will seek protection under the patent or copyright law.

More recently, the practice of the Copyright Office was again approved in *William A. Meier Glass Co.* v. *Anchor Hocking Glass Corp.*, 95 F. Supp. 264 (W. D. Pa.). There, the action was for deceit and breach of trust by the defendant in using plaintiff's "loop" design as decoration on glassware. Since neither a design patent nor a copyright had been obtained by plaintiff, the court held that plaintiff's right to relief must be determined by reference to the common law. In passing, however, the court pointed out that (p. 267):

> The plaintiff's design being novel and original could have been the subject of a design patent since the originator of a new and novel design for an article of merchandise, who desires to prevent the right to free use and copying by others, is afforded the protection of the patent laws. 35 U. S. C. A. § 73.
>
> * * * * *
>
> Furthermore, the plaintiff would have been entitled, in order to protect his design,

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> to invoke the protection of the copyright laws of the United States since the creation would fall within the terms of the Copyright Act, under which it would be included as works of art; models or designs for works of art. Section 5 (g) of the Copyright Act of 1947, 17 U. S. C. A. § 5 (g); 17 U. S. C. A. § 207; Section 201.4 (b) (7) of the Rules and Regulations of the Federal Register, following 17 U. S. C. A. § 207; 17 U. S. C. A. § 53.

Contrary to petitioners' views, therefore, it seems clear that, in appropriate cases, protection may be available for a work under either the Design Patent Law or the Copyright Law.[19] This is not to say, of course, that protection may be secured under both laws; the creator of the work must elect the protection he desires. We submit, however, that even if a design patent would have been available to respondents here, copyright registration was not precluded.

[19] Petitioners rely on *Taylor Instrument Companies* v. *Fawley-Brost Co.*, 139 F. 2d 98 (C. A. 7), in support of their contention that there is no overlapping territory in the Copyright and Design Patent Laws (Pet. Br. 37). That case holds, however, only that the Copyright and *Mechanical* Patent Laws are mutually exclusive. See also to the same effect, *Brown Instrument Co.* v. *Warner*, 161 F. 2d 910 (C. A. D. C.). And compare the latter court's decision in *In re Blood*, 23 F. 2d 772, recognizing that the Copyright and *Design* Patent Laws are not mutually exclusive. See pp. 43–44, *supra*.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

ROBERT L. STERN,
Acting Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
PAUL A. SWEENEY,
BENJAMIN FORMAN,
Attorneys.

GEORGE D. CARY,
Principal Legal Adviser,
United States Copyright Office.

NOVEMBER 1953.

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APPENDIX A

1. The Copyright Laws

a. Act of July 8, 1870, 16 Stat. 198:

> SEC. 86. *And be it further enacted,* That any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and his executors, administrators, or assigns, shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others; and authors may reserve the right to dramatize or to translate their own works.

b. Act of June 18, 1874, 18 Stat. 78:

> SEC. 3. That in the construction of this act, the words "Engraving," "cut" and "print" shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the super-

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vision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label not a trade mark, six dollars, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents, to the party entering the same.

c. Act of August 1, 1882, 22 Stat. 181:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright may put the copyright mark prescribed by section forty-nine hundred and sixty two of the Revised Statues, and acts additional thereto, upon the back or bottom of such articles, or in such other place upon them as it has heretofore been usual for manufacturers of such articles to employ for the placing of manufacturers, merchants, and trade marks thereon.

d. Act of March 4, 1909, 35 Stat. 1075:

SEC. 4. That the works for which copyright may be secured under this Act shall include all the writings of an author.

SEC. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations;

(b) Periodicals, including newspapers;

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(c) Lectures, sermons, addresses, prepared for oral delivery;

(d) Dramatic or dramatico-musical compositions;

(e) Musical compositions;

(f) Maps;

(g) Works of art; models or designs for works of art;

(h) Reproductions of a work of art;

(i) Drawings or plastic works of a scientific or technical character;

(j) Photographs;

(k) Prints and pictorial illustrations:

Provided, nevertheless, That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act.

e. Act of July 30, 1947, 61 Stat. 652, codifying and enacting into positive law Title 17 of the United States Code:

17 U. S. C. 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

17 U. S. C. 3. PROTECTION OF COMPONENT PARTS OF WORK COPYRIGHTED; COMPOSITE WORKS OR PERIODICALS.—The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite

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works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title.

17 U. S. C. 4. ALL WRITINGS OF AUTHOR INCLUDED.—The works for which copyright may be secured under this title shall include all the writings of an author.

17 U. S. C. 5. CLASSIFICATION OF WORKS FOR REGISTRATION.—The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.

(b) Periodicals, including newspapers.

(c) Lectures, sermons, addresses (prepared for oral delivery).

(d) Dramatic or dramatico-musical compositions.

(e) Musical compositions.

(f) Maps.

(g) Works of art; models or designs for works of art.

(h) Reproductions of a work of art.

(i) Drawings or plastic works of a scientific or technical character.

(j) Photographs.

(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.

(l) Motion-picture photoplays.

(m) Motion pictures other than photoplays.

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate

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or impair the copyright protection secured under this title.

2. The Design Patent Laws

a. Act of August 29, 1842, 5 Stat. 543:

SEC. 3. *And be it further enacted,* That any citizen or citizens, or alien or aliens, having resided one year in the United States and taken the oath of his or their intention to become a citizen or citizens who by his, her, or their own industry, genius, efforts, and expense, may have invented or produced any new and original design for a manufacture, whether of metal or other material or materials, or any new and original design for the printing of woollen, silk, cotton, or other fabrics, or any new and original design for a bust, statue, or bas relief or composition in alto or basso relievo, or any new and original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed or painted or cast or otherwise fixed on, any article of manufacture, or any new and original shape or configuration of any article of manufacture not known or used by others before his, her, or their invention or production thereof, and prior to the time of his, her, or their application for a patent therefor, and who shall desire to obtain an exclusive property or right therein to make; use, and sell and vend the same, or copies of the same, to others, by them to be made, used, and sold, may make application in writing to the Commissioner of Patents expressing such desire, and the Commissioner, on

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due proceedings had, may grant a patent therefor, as in the case now of application for a patent: *Provided,* That the fee in such cases which by the now existing laws would be required of the particular applicant shall be one-half the sum and that the duration of said patent shall be seven years, and that all the regulations and provisions which now apply to the obtaining or protection of patents not inconsistent with the provisions of this act shall apply to applications under this section.

b. Act of July 8, 1870, 16 Stat. 198:

SEC. 71. *And be it further enacted,* That any person who, by his own industry, genius, efforts, and expense, has invented or produced any new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief; any new and original design for the printing of wool[l]en, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon payment of the duty required by law, and other due proceedings had the same as in cases of inventions or discoveries, obtain a patent therefor.

c. Act of May 9, 1902, 32 Stat. 193:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sec-

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tion forty-nine hundred and twenty-nine of the Revised Statutes be, and the same is hereby, amended so as to read as follows:

"SEC. 4929. Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, the same as in cases of inventions or discoveries covered by section forty-eight hundred and eighty-six, obtain a patent therefor."

d. Act of July 19, 1952, 66 Stat. 792, codifying and enacting into positive law Title 35 of the United States Code:

35 U. S. C. 171. PATENTS FOR DESIGNS

Whoever invents any new, original and ornamental design for an article of manuture may obtain a patent therefor, subject to the conditions and requirements of this title.

The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided.

35 U. S. C. 289. ADDITIONAL REMEDY FOR INFRINGEMENT OF DESIGN PATENT

Whoever during the term of a patent for a design, without license of the owner, (1) applies the patented design, or any colorable imitation thereof, to any article of

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manufacture for the purpose of sale, or (2) sells or exposes for sale any article of manufacture to which such design or colorable imitation has been applied shall be liable to the owner to the extent of his total profit, but not less than $250, recoverable in any United States district court having jurisdiction of the parties.

Nothing in this section shall prevent, lessen, or impeach any other remedy which an owner of an infringed patent has under the provisions of this title, but he shall not twice recover the profit made from the infringement.

3. Rules and Regulations of the Copyright Office

The pertinent provisions of the 1910 and 1917 regulations are set forth in the brief, *supra,* pp. 24–25. Section 202.8 of the current regulations (37 C. F. R. 1949 ed. 2028) states as follows:

Works of art (Class G)—(a)— In General. This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. Works of art and models or designs for works of art are registered in Class G on Form G, except published three-dimensional works of art which require Form GG.

(b) *Published three-dimensinoal works of art.* All applications for copyright registration of published three-dimensional works of art shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger

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than nine by twelve inches, but preferably shall be eight by ten inches, nor shall it present an image of the work smaller than four inches in its greatest dimension. The title of the work shall appear on each photograph. In addition to the photographs, application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

(1) *Option A.* Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country). The Copyright Office will retain the copies for disposition in accordance with its usual practice.

(2) *Option B.* Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country) and in addition mark the package with the special label supplied by the Copyright Office or by the use of other appropriate means indicating that Option B has been chosen. The Copyright Office will promptly return the copies to the copyright claimant or to his agent, at an address within the United States, at his expense.

(3) *Option C.* Send no copies of the work. If Option C is selected the Copyright Office will issue its certificate, bearing a notation that photographs were accepted in place of copies, but expresses no opinion as to the need for, or possible effect of delay in, making deposit of copies prior to suit for infringement of copyright.

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APPENDIX B

Typical Examples From the Catalog of Copyright Entries—1912 to 1952—Showing Registrations of Works of Art Possessing Utilitarian Aspects

Owl head bookends. [Statuette of owl's head with rectangular base.] Copyright May 8, 1912; Registration number G 40845. Copyright claimant: Myra M. Carr, New York.

Lamp. [Lamp having candelabrum stand and ornate umbrella-shaped top.] Copyright May 8, 1912; Registration number G 40848. Copyright claimant: W. H. Starenhagen Co., New York.

Doorknocker, Nichols House, Salem, Mass. [Ornate knocker with oval plate for name, in bas-relief.] Copyright May 25, 1912, Registration number G 40937. Copyright claimant: Sarah D. Symonds, Salem, Mass.

Ornamental desk model. [Top of desk upheld by four pillars with ornamental caps, and labeled, Benefactors of orphan asylum.] Copyright December 20, 1912; Registration number G 42458. Copryright claimant: Daprato Statuary Co., Chicago.

Bear ashtray. [Young bear seated in heart-shaped tray scratching his ear.] Copyright October 21, 1912; Registration number G 42038. Copyright claimant: Albert Humphreys, New York.

Lighting fixture design. By F. E. Guitini. [Bowl-shaped bracket embellished with figure of half-nude woman standing in bunch of flowers.] Copyright December 28, 1912. Registration num-

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ber G 42645. Copyright claimant: Kathodion Bronze Works, New York.

Electric candelabra. [Model of ornamental candelabra with globes for numerous lights.] Copyright January 2, 1917; Registration number G 53384. Copyright claimant: Daprato Statuary Co., Chicago.

Electric portable table lamp. [Model of table lamp decorated with leaves and bird in nest.] Copyright March 22, 1917; Registration number G 53846, Copyright claimant: Andrew Garbutt, Holliston, Mass.

Candlestick. [Figure of little Colonial lady in full skirts, holding bunch of tulips in which candle stands.] Copyright December 22, 1917; Registration number G 53401. Copyright claimant: Helen Adele Lerch, Chicago.

Candelabra. [1. Model of candelabra with 13 lights on two tiers and ornamental base, 2. same with attachment for electric lights.] 1.) Copyright April 20, 1917; Registration number G 54040; 2.) Copyright May 16, 1917; Registration number G 54205. Copyright claimant: Daprato Statuary Co., Chicago.

American inkstand. [Figure of eagle with wings spread, perched behind inkwell.] Copyright April 20, 1917; Registration number G 54100. Copyright claimant: Kathodion Bronze Works, Inc., New York.

Door knocker. [Horse's head with horseshoe and spur attached to form knocker.] Copyright May 29, 1917; Registration number G 54291. Copyright claimant: Harry La Montague, New York.

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Bookend. [In form of peacock with open tail.] Copyright August 24, 1917; Registration number G 54775. Copyright claimant: Florentine Art Plaster Co., Philadelphia.

Auto radiator emblem. [Model of Liberty Bell with eagle perched on top, flag at right and bust of President Wilson at left.] Copyright July 27, 1917; Registration number G 54652. Copyright claimant: Patrick Kilmartin, Chicago.

Knocker. [Ornate door knocker in bas-relief.] Copyright August 22, 1917; Registration number G 54760. Copyright claimant: Sarah W. Symonds.

Lamp portable 70.—[Model of lamp standard with lotus flowers at top, globular formation in center and large round base.] Copyright January 14, 1922; Registration number 64480, copyright claimant: American Statuary and Decorating Co., Philadelphia.

Boudoir lamp. [Model of small lamp decorated with leaves and flowers.] Copyright January 20, 1922; Registration number G 64633, Copyright claimant: Max B. Baum, Brooklyn.

Chandelier. [Model of ornamental chandelier for electric lights]. Copyright February 25, 1922; Registration number G 64889. Copyright claimant: Daprato Statuary Co., Chicago.

Sanctuary lamp. [Model of lamp with eight-day ruby glass and electric light.] Copyright March 20, 1922; Registration number G 55258. Copyright claimant: Daprato Statuary Co., Chicago.

Table lamp. [Model of tall lamp having standard decorated with scrolls and leaves.] Copyright August 11, 1922; Registration number

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G 66415. Copyright claimant: Frank D. Betita, Linden, N. J.

Lamp base. [By Louis Ramanelli. Model of base with cylinder and cherubs in relief around foot.] Copyright October 23, 1922; Registration number G 66787. Copyright claimant: Florence Art Co., Chicago.

Lamp base 98. [By Aurelius Renzetti. Model of lamp with oak leaf design on oval base and around top.] Copyright March 9, 1924; Registration number G 71406. Copyright claimant: American Statuary and Decorating Co., Inc. Philadelphia.

Illuminated vase and portable lamp. [Model of vase and separable top reading lamp combined.] Copyright February 15, 1924; Registration number G 70781. Copyright claimant: Charles Edward Blake, San Francisco.

Gothic electrolier. [Model very ornamental electrolier with sixteen lights.] Copyright February 9, 1924; Registration number G 70750. Copyright claimant: Daprato Statuary Co., Chicago.

Chinese flapper lamp. [Figure of Chinese girl with bobbed hair climbing lamp post.] Copyright February 25, 1924; Registration number G 70815. Copyright claimant: Leon Fighiera, San Francisco.

Newspaper holder. [Model of owl with wings outspretd standing on base curved up at end.] Copyright November 26, 1923; Registration number G 70355. Copyright claimant: Jessie Emma Gross, La Porte, California.

Oblong base boudoir lamp. [Leaf design lamp with graduated fluted stem. Oval base boudoir

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lamp. Floral design lamp with graduated flushed stem.] Copyright April 23, 1924; Registration number G 71277, G 71278. Copyright claimant: Charles A. Keaton, New York.

Metal floor lamp. [Design of lamp with large round base supporting tall sound standard.] Copyright February 23, 1924; Registration number G 70811. Copyright claimant: Laubenheimer Co., Chicago.

Ashtray. [Model of three nude girls holding up bowl.] Copyright March 20, 1924; Registration number G 71034. Copyright claimant: Eva Hall Miller, Bloomington, Ind.

Shelf side bracket. [Model of electric fixture in form of shelf.] by Aurelius Renzetti. Copyright August 9, 1924; Registration number G 72034. Copyright claimant: American Statuary and Decorating Co., Philadelphia.

Lamp stand. [Model of architectural base with branch of flowers and ribbon effect, and shape covered with fern leaves in low relief.] Copyright January 6, 1927; Registration number G 79278. Copyright claimant: Paolo Testi, Woodcliff, N. J.

Angel No. 3461. [Figure of angel holding electric candelabra with head turned to left.] Copyright April 28, 1927; Registration number G 80042. Copyright claimant: Daprato Statuary Co., Chicago.

Bronze Cinerary urn to contain ashes for six interments. Copyright February 18, 1932; Registration number G 8068. Copyright claimant: Grove Hinman.

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Modern Roman design sanctuary railing. Copyright April 23, 1932; Registration number G 8523. Copyright claimant: A. Daprato Co.

Eagle for U. S. Embassy in Paris Gatepost. Copyright June 14, 1932; Registration number G 8938. Copyright claimant: Carl P. Jennewein.

Sundial. Copyright June 11, 1932; Registration number G 8896. Copyright claimant: George J. Lober.

Bryant Memorial bird font and bath. Copyright June 25, 1932. Registration number G 9014; Copyright claimant: Jos. Newall & Co.

Three Lancet Gothic Window with scenes depicting different aspects of Christ's life. Copyright July 5, 1932; Registration number G 9042. Copyright claimant: Henry L. Willet.

Lady Vase. Copyright March 14, 1937; Registration number G 25176; Copyright claimant: Louis A. Butler.

Running greyhound in open work. [Candleholder] Copyright December 30, 1936; Registration number G 24450. Copyright claimant: Margaret Ruth Clovinger.

Memorial bronze door. Copyright February 1, 1937; Registration number G 24745. Copyright claimant: James S. J. Novelli.

Mermaid bookend. Copyright April 12, 1937; Registration number G 25511. Copyright claimant: Eileen Parnell Bohland.

Hanging holy water font. Copyright March 8, 1937; Registration number G 25359. Copyright claimant: St. Paul Statuary Co.

Baptismal font. Copyright December 20, 1937; Registration number G 27734. Copyright claimant: Vermont Marble Co.

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Cement basin for fountain or bird bath. Copyright February 27, 1942; Registration number G 40154. Copyright claimant: Ernest Pellegrini.

Winterman Memorial Bench. Copyright July 13, 1942; Registration number G 40365. Copyright claimant: Lorenz W. Stolz.

Cat and bird nest. [Plaster lamp base.] Copyright November 11, 1946; Registration number G 4015. Copyright claimant: Alfred Alter Corp., New York.

Perfect pipeholder. [Metal.] Copyright July 18, 1947; Registration number GP 6110. Copyright claimant: Abalin Casting Co., New York.

Chinaman cook. [Salt shaker.] Ceramic figurine. Copyright July 20, 1946; Registration number G 4852. Copyright claimant: A. C. Kendig, South Pasadena, Calif.

Sitting Piggy bank. [Plaster coin bank.] Copyright May 1, 1947; Registration number G 5387. Copyright claimant: Columbia Statuary Co., Chicago.

Sitting elephant caricature. [Metal coin bank.] Copyright January 15, 1947; Registration number G 3906. Copyright claimant: National Arts, New York.

Hereford bullhead bookend. [Metal.] Copyright July 1, 1947; Registration number GP 6190. Copyright claimant: Gladys Brown, Pomona, Calif.

Leaf ivyholder. [Fan-shaped lead with two scrolls at base; plaque.] Copyright February 28, 1952; Registration number GP 3475. Copyright claimant: Art Mount Manufacturing Co., d. b. a. Art Mount, Brooklyn, N. Y.

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Snowman casserole. [Ceramic.] Copyright December 28, 1951; Registration number GP 3228. Copyright claimant: Barnes-Chase Co., Los Angeles, Calif.

Cookie stove. [Ceramic jar in form of old-fashioned stove.] Copyright January 20, 1952; Registration number GP 3223. Copyright claimant: California Cleminsons, El Monte, Calif.

Perfume Tray. [With oriental figures and building on tray; ends pointed.] Copyright February 25, 1952; Registration number GP 3400. Copyright claimant: Yule Manufacturing Co., Inc., Brooklyn, N. Y.

Striptease salt and pepper shakers. [Barrel-shaped shakers with nude and partially nude fameales as handles.] Copyright April 30, 1951; Registration number GP 3522. Copyright claimant: Norman & Howard Kreiss, d. b. a. Kreiss & Co., Los Angeles, Calif.

Galagray fish bowl. [Ceramic fish-shaped bowl.] Copyright July 20, 1952; Registration number GP 4123. Copyright claimant: California Cleminsons, El Monte, Calif.

Combination bowl, flower holder and ashtray. [Free form bowl; philodendron leaf; spiral flower holder, Ceramic.] Copyright September 1, 1952; Registration number GP 4188. Copyright claimant: Lee Parhomenko and Roselle Junqua.

Waldorf Ware. [Plate with acorn and oak leaf pattern.] Copyright September 8, 1952; Registration number GP 4207. Copyright claimant: Shenango Pottery Co., t. a. Shenango China, New Castle, Pa.

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APPENDIX C

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4. If the author, artist, or designer is living, state citizenship and residence; if naturalized citizen, so state. If dead, state what was nationality when living. It is not necessary to divulge the name and residence of any author, artist, or designer who is not also the claimant of the copyright, but it is **obligatory to indicate the nationality or citizenship.**	**4. Name and Nationality of Author, Artist, or Designer.** *Name* H Hanley Parker [May be withheld if desired.] *Residence* 1803 N Park Av. Phila Pa. [May be withheld if desired.] *Nationality or Citizenship.* United States. A. [MUST BE GIVEN.]
5. State whether copyright is claimed as *Author, Designer,* or *Proprietor.* ☞ Write in one only of these three legal designations, and use no other term or terms.	**5. Form of Claim.** Designer
6. Give name of person to whom reply is to be sent, together with full address.	**6. Name and Address to Whom Reply is to be Mailed.** *Name* H Hanley Parker *Address* 1803 N Park Av Philadelphia. Pa

CLI 9321 JAN 8 1904

50 CTS. WITHOUT CERTIFICATE. FINE ARTS.

631 JAN 8 1904

DESCRIPTION.

Write or typewrite here a brief description of the PAINTING, DRAWING, STATUE, STATUARY, or MODEL or DESIGN INTENDED TO BE PERFECTED AS A WORK OF THE FINE ARTS. The description must, however, be sufficiently full to completely identify the article.

A female figure bearing an urn in front partly supported by drapery around the head. The figure made from the waist up and below this the form concealed by conventionalized skirt draperies which flow down and forward forming a tray at the base. Sides and back of skirt in fluted form.

The whole being designed as a candlestick with match tray.

The figure standing and bent forward from hips and waist.

PHOTOGRAPH ON FILE

APPLICATION FOR COPYRIGHT REGISTRATION.

FORM B ORIGINAL WORKS OF ART.

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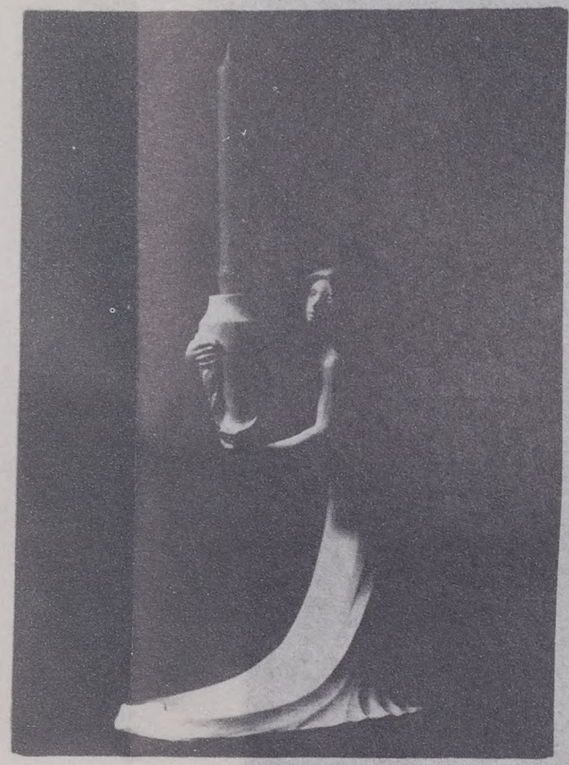

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4. If the author, artist, or designer is living, state citizenship and residence; if naturalized citizen, so state. If dead, state what was nationality when living. It is not necessary to divulge the name and residence of any author, artist, or designer who is not also the claimant of the copyright, but it is **obligatory to indicate the nationality or citizenship.**	**4. Name and Nationality of Author, Artist, or Designer.** *Name* [May be withheld if desired.] *Residence* [May be withheld if desired.] *Nationality or Citizenship.* French [MUST BE GIVEN.]
5. State whether copyright is claimed as *Author*, *Designer*, or *Proprietor*. Write in one only of these three legal designations, and use no other term or terms.	**5. Form of Claim.** Proprietor
6. Give name of person to whom reply is to be sent, together with full address.	**6. Name and Address to Whom Reply is to be Mailed.** CERTIFICATE *Name* André Lesourd APR 28 1904 MAILED. *Address* 71 Broadway, New York

$1.50 WITH CERTIFICATE. FINE ARTS.

DESCRIPTION.

Write or typewrite here a brief description of the PAINTING, DRAWING, STATUE, STATUARY, or MODEL or DESIGN INTENDED TO BE PERFECTED AS A WORK OF THE FINE ARTS. The description must, however, be sufficiently full to completely identify the article.

CLI 10352 APR 25 1904 APR. 25 1904

FOUR STAGES OF LIFE.A bronze clock,four sides and each one of the four sides in bas relief is representing one of the phases of life.The clock rests on four feet,the two front ones being in the shape of leaves;the front panel represents the figure of a woman seated,holding a flower in her right hand,resting her head in her left hand with a background of naked trees.

PHOTOGRAPH ON FILE

APPLICATION FOR COPYRIGHT REGISTRATION.

FORM B ORIGINAL WORKS OF ART.

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APR. 25 1904

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4. If the author, artist, or designer is living, state citizenship and residence; if naturalized citizen, so state. If dead, state what was nationality when living. It is not necessary to divulge the name and residence of any author, artist, or designer who is not also the claimant of the copyright, but it is **obligatory to indicate the nationality or citizenship.**	**4. Name and Nationality of Author, Artist, or Designer.** *Name* [May be withheld if desired.] *Residence* [May be withheld if desired.] *Nationality or Citizenship.* [MUST BE GIVEN]
5. State whether copyright is claimed as *Author*, *Designer*, or *Proprietor*. ☞ Write in one only of these three legal designations, and use no other term or terms.	**5. Form of Claim.**
6. Give name of person to whom reply is to be sent, together with full address.	**6. Name and Address to Whom Reply is to be Mailed.** *Name* *Address* CERTIFICATE MAILED

$1.00 WITH CERTIFICATE. FINE ARTS.

DESCRIPTION.

CLI 12735 NOV 23 1904

36467 NOV 23 1904

Write or typewrite here a brief description of the PAINTING, DRAWING, STATUE, STATUARY, or MODEL or DESIGN INTENDED TO BE PERFECTED AS A WORK OF THE FINE ARTS. The description must, however, be sufficiently full to completely identify the article.

The model or design is ornamental spoon showing a pictorial history of Oregon. On the face appears in succession, an Indian, busts of Lewis and Clark, a winged figure between the years 1806 and 1906, the word "Portland," a ship, a railroad train, a tree and a salmon. On the back appear Mt. Hood and Multnomah Falls.

PHOTOGRAPH ON FI

Proprietor and made by B. K. S.

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B
ORIGINAL WORKS OF ART

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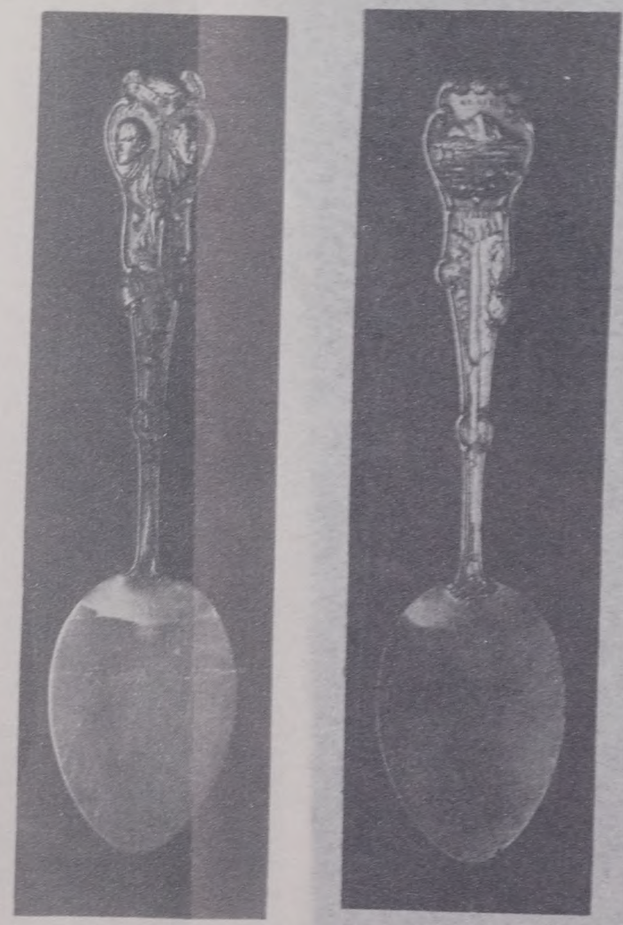
36467 A - 23 1904



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4. If the author, artist, or designer is living, state citizenship and residence; if naturalized citizen, so state. If dead, state what was nationality when living. It is not necessary to divulge the name and residence of any author, artist, or designer who is not also the claimant of the copyright, but it is **obligatory to indicate the nationality or citizenship.**	**4. Name and Nationality of Author, Artist, or Designer.** *Name* [May be withheld if desired.] *Residence* [May be withheld if desired.] *Nationality or Citizenship.* Citizen of United States [MUST BE GIVEN.]
5. State whether copyright is claimed as *Author*, *Designer*, or *Proprietor*. ☞ Write in one only of these three legal designations, and use no other term or terms.	**5. Form of Claim.** Designer
6. Give name of person to whom reply is to be sent, together with full address.	**6. Name and Address to Whom Reply is to be Mailed.** *Name* John C. Meyenberg *Address* Tell City Perry Co. Indiana

CERTIFICATE
JUN 25 1906
MAILED

$1.00 WITH CERTIFICATE. FINE ARTS.

DESCRIPTION.

CL I 18333 JUN 20 1906

Write or typewrite here a brief description of the PAINTING, DRAWING, STATUE, STATUARY, or MODEL or DESIGN INTENDED TO BE PERFECTED AS A WORK OF THE FINE ARTS. The description must, however, be sufficiently full to completely identify the article.

JUN 20 1905

Magazine Rack

A receptacle for Magazines Current Literature and Newspapers

The Design consists of the head with waving hair, and out stretched arms of a young woman surrounded by oak leaves and scrolls

It is to be reproduced in metal terra cotta and composition

The size is (27") twenty seven inches by (13½") thirteen and one half inches.

PHOTOGRAPH ON FILE.

APPLICATION FOR COPYRIGHT REGISTRATION.

FORM B
ORIGINAL WORKS OF ART.

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JUN 20 1906

Proprietor card made by O. C. W.

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4. If the author, artist or designer is living, state citizenship and residence; if dead, state nationality. If naturalized citizen of the United States, so state. It is not necessary to divulge the name and residence of any author who is not also the claimant of the copyright. It is **obligatory to indicate the nationality.** The meaning of the word *"nationality"* in this case is the country to which the applicant now owes allegiance by birth or *naturalization.*	6. Name of the ~~Author~~ ~~Designer~~ Artist and of the Country of which he is now a Citizen or Subject. *Name,* Fredk J R Roth [May be withheld if desired.] *Residence* 27 Cottage Place White Plains N.Y. [May be withheld if desired.] **Nationality,** [Name of country of which he is now a citizen or subject.] U S A [MUST BE GIVEN.]
5. State whether copyright is claimed as *Author, Designer,* or *Proprietor.* ☞ Write in one only of these three legal designations, and use no other term or terms.	5. Form of Claim. Author

$1.00 WITH CERTIFICATE. FINE ARTS.

CL I 18449 JUL -2 1906

DESCRIPTION.

Write or typewrite here a brief description of the PAINTING, DRAWING, STATUE, STATUARY, or MODEL or DESIGN INTENDED TO BE PERFECTED AS A WORK OF THE FINE ARTS. The description must, however, be sufficiently full to completely identify the article, without the aid of the photograph. (See page 3.)

JUL 2 1906

The piece of Statuary entitled "Bear & Bangster" represents a Bear who standing below an Bangster the fruits of which form electric Lights. The animal supports itself with his right paw [10] while its looking towards the fruit he licks his left paw lovingly. The shape of the tree is conventional. to serve as electrolier. The Model is about 9 5/8 inches high

PHOTOGRAPH ON FILE.

Proprietor card
Place by O. C. W.

FORM B
ORIGINAL WORKS OF ART

JUL 2 1906

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4. If the author, artist or designer is living, state citizenship and residence; if dead, state nationality. If naturalized citizen of the United States, so state. It is not necessary to divulge the name and residence of any author who is not also the claimant of the copyright. It is **obligatory to indicate the nationality.** The meaning of the word *"nationality"* in this case is the country to which the applicant now owes allegiance by birth or *naturalization.*	**6. Name of the {Author / Designer / Artist} and of the Country of which he is now a Citizen or Subject.** *Name,* Eli Harvey. [May be withheld if desired.] *Residence,* 80 Washington Sq. East. N.Y. city. [May be withheld if desired.] **Nationality,** {Name of country of which he is now a citizen or subject.} American. U.S.A. [MUST BE GIVEN.]
5. State whether copyright is claimed as *Author, Designer,* or *Proprietor.* ☞ Write in one only of these three legal designations, and use no other term or terms.	**5. Form of Claim.** Designer.

DESCRIPTION.

Write or typewrite here a brief description of the PAINTING, DRAWING, STATUE, STATUARY, or MODEL or DESIGN INTENDED TO BE PERFECTED AS A WORK OF THE FINE ARTS. The description must, however, be sufficiently full to completely identify the article, without the aid of the photograph. (See page 3.)

CL I 20288 DEC-5 1906 MAKE ☆ NO.
DEC 5 1906
50 CTS. WITHOUT CERTIFICATE. FINE ARTS.

This Statuviary piece. Entitled Paper Cutter - consists of a crouching or sleeping Leopard, which rests upon one end of the blade or cutter and forms the handle.
His fore feet are Extended in front of him facing the point of blade, his head rests across his fore legs turned toward his right. The tail is curled around and the end rests upon the Edge of blade near the right shoulder.
The Leopard rests upon his two elbows. While his hind portion is turned more to the left hip.
On the top, right hand edge of blade near the right paw. is the following inscription. "A Silent Partner." The piece is in bronze.

Eli Harvey.

PHOTOGRAPH ON FILE
DEC 5 1906
Proprietor card made by O.C.W. W.J.T.

APPLICATION FOR COPYRIGHT REGISTRATION.

FORM B
ORIGINAL WORKS OF ART

The law requires the filing of **one copy** of a **photograph** taken directly from the Painting, Drawing, Statue, Statuary, or Model or Design intended to be perfected as a work of the fine arts. This photograph should preferably be mounted upon this page.

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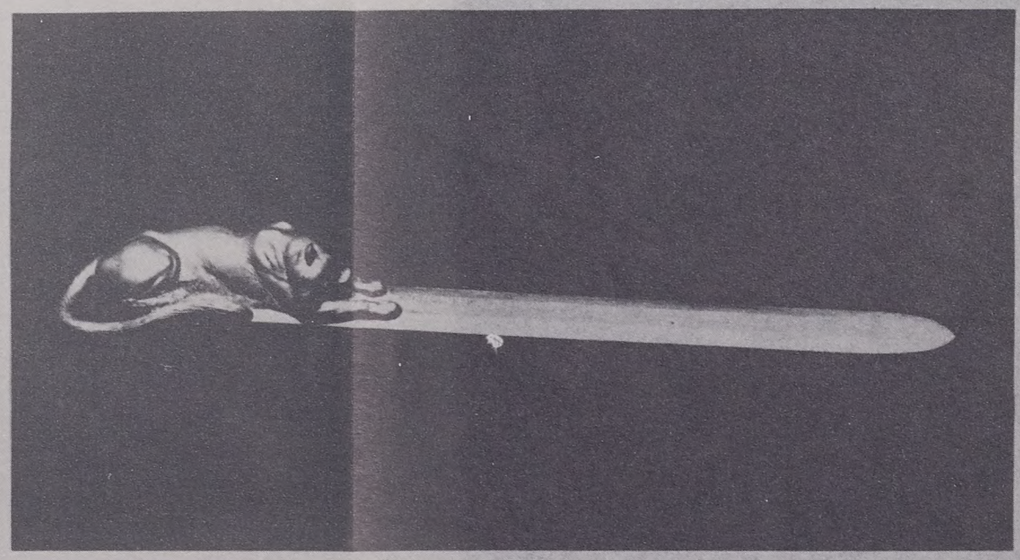
DEC 5 1906



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4. If the author, artist or designer is living, state citizenship and residence; if dead, state nationality. If naturalized citizen of the United States, so state.

It is not necessary to divulge the name and residence of any author who is not also the claimant of the copyright. It is **obligatory to indicate the nationality.** The meaning of the word *"nationality"* in this case is the country to which the applicant now owes allegiance by birth or *naturalization.*

6. **Name of the** {Author / Designer / Artist} **and of the Country of which he is now a Citizen or Subject.**

Name, Eli Harvey
[May be withheld if desired.]

Residence, 80. Washington Square. New York City.
[May be withheld if desired.]

Nationality, {Name of country of which he is now a citizen or subject.} American.
[MUST BE GIVEN.]

5. State whether copyright is claimed as *Author, Designer,* or *Proprietor.*

☞ Write in one only of these three legal designations, and use no other term or terms.

5. **Form of Claim.**

Designer.

CL I 20289 DEC - 5 1906

DESCRIPTION.

Proprietor card made by ~~O. C. W.~~ W. J. T.

MAKE ☆ NO. DEC 5 1906

50 CTS. WITHOUT CERTIFICATE. FINE ARTS.

Write or typewrite here the exact description of the PAINTING, DRAWING, STATUE, STATUARY, or MODEL or DESIGN INTENDED TO BE PERFECTED ~~AS A WORK OF THE~~ FINE ARTS. The description must, however, be sufficiently full to completely identify the article, without the aid of the photograph. (See page 3.)

This Statuary Design for Stationery Cabinet consists of a cabinet in form of a rectangular octagon. 17¾ in long × 9 in wide × 3½ in high, width of corners 2½ in. These measurements are the extremes including the moulding at top and bottom of Cabinet. The four sides of Cabinet are recessed panels. The front panel of Cabinet is the front of a drawer the length of which is full size of panel or depth is equal to the width of Cabinet. The drawer has a key-hole at the middle. There are six Puma heads with rings in their mouths, placed on the panels of Cabinet. two on the front or drawer acting as pullers. two on opposite or rear panel. and one in the center of each end panel. The Cabinet rests upon four conventionalized Lion's heads attached to the underside of the Corners of Cabinet. The upper band of moulding extends slightly above the surface of Cabinet as a flange. On the top of Cabinet is middle or at the near side is placed a pedestal in design that of the Ionian Capital, on which is placed the head of an American Elk. including part of his neck. the ears are finished. The antlers are that of an adult. The nose is gently raised and points to the front of cabinet. To the right hand Elk, as a band or cup in which there is placed the round cut glass cup with sponge. To the left of head of Elk is the band or cup in which is placed a black brush or pen cleaner.

At the middle of Each end of Cabinet is placed a 3 in cut glass ink well, held in place by a flange of moulding. As a cover for these ink wells, there are four oak leaves drooping, two on each of the four sides at the center top of the ink wells is a squirrel sitting with tail curled over his back, holding an acorn to his mouth with both paws. This acorn is attached to a twig with two other acorn cups. The two ink wells covers are of same design, and the squirrels set facing each other. The covers lift off. The entire piece is of bronze Electro plated in gold, with the exception of the leaves mentioned as of cut glass. Copies may be made with other finish: but all of bronze, the surface colouring or patina only, varying from thin gold ~~Electro plate~~ to

PHOTOGRAPH ON FILE.

Eli Harvey. DEC 5 1906

APPLICATION FOR COPYRIGHT REGISTRATION.

FORM B ORIGINAL WORKS OF ART

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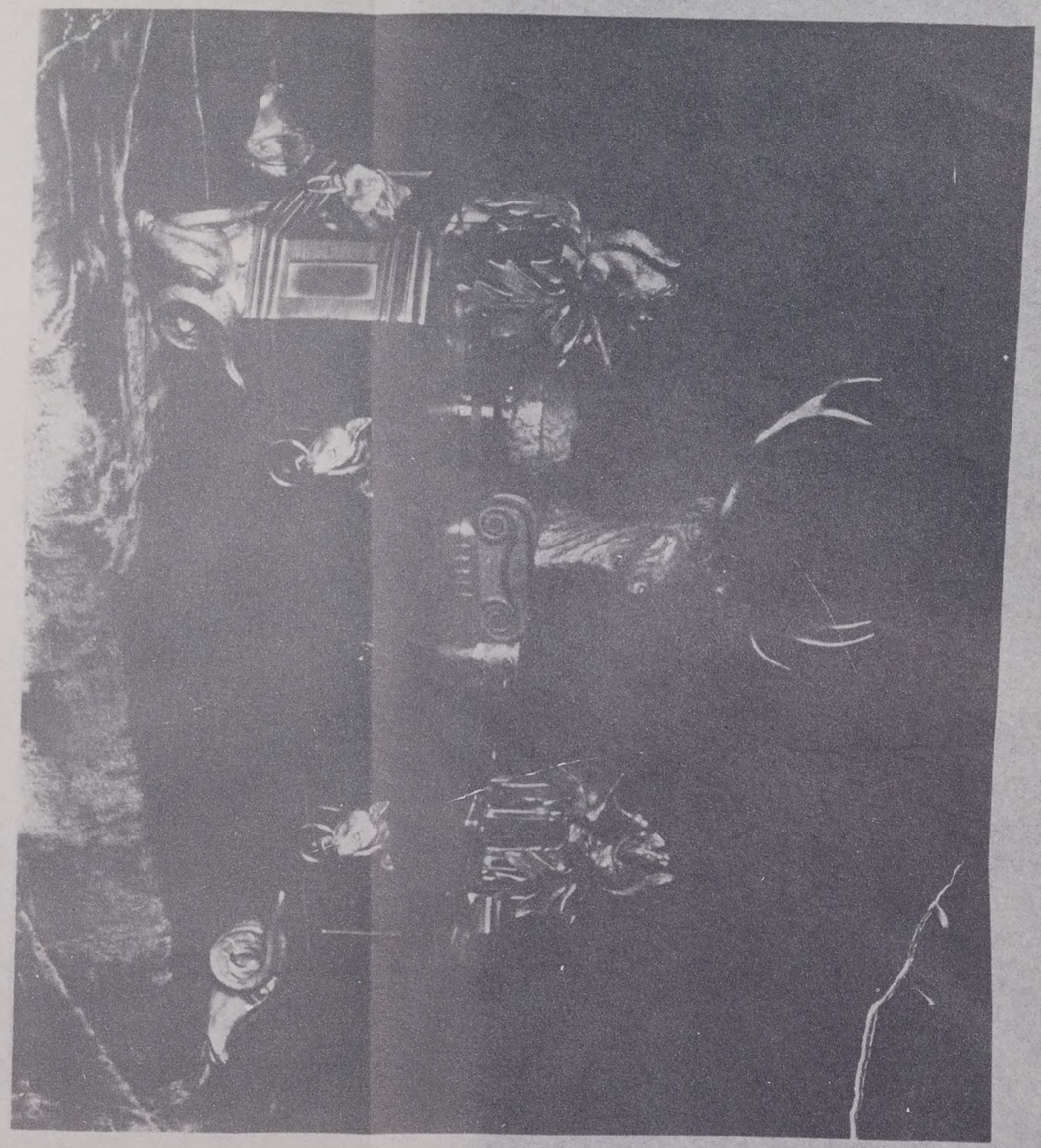

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

No. 228

EMANUEL L. MAZER AND WILLIAM ENDICTER, DOING BUSINESS AS JUNE LAMP MANUFACTURING COMPANY,

Petitioners,

VS.

BENJAMIN STEIN AND RENA STEIN, DOING BUSINESS AS REGLOR OF CALIFORNIA

Respondents.

Reply Brief for Petitioners

MAX R. KRAUS,
33 N. LaSalle St.,
Chicago, Ill.

ROBERT L. KAHN,
105 W. Adams St.,
Chicago, Ill.
Counsel for Petitioners.

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IN THE

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Petitioners,

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BENJAMIN STEIN AND RENA STEIN, DOING BUSINESS AS REGLOR OF CALIFORNIA

Respondents.

Reply Brief for Petitioners

EXISTENCE OF DESIGN PATENT LAWS AFFECTS SCOPE AND INTERPRETATION OF COPYRIGHT LAWS RELATING TO THREE DIMENSIONAL WORKS OF ART.

Petitioners have previously asserted and demonstrated (Pet. Br. pp. 14-19) that the existence of the design patent laws makes it necessary to interpret the copyright laws **INSOFAR AS THREE DIMENSIONAL WORKS OF ART ONLY** are concerned in a manner to avoid duplication or overlap. Respondents (Res. Br. p. 26) content themselves with the assertion that "Neither refers to the

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other." The Copyright Office does not meet this thesis squarely. It argues that the monopolies are different; it distorts the question presented to avoid the use of "manufacturer" (Copy. Br. p. 2) and purports to demolish petitioner's argument on mass production in a footnote (Copy. Br. p. 15) to the effect that mass production of books and paintings have never been condemned. The copyrighted contents of a book or the printed reproduction of a painting is not an article of manufacture.

The Consolidated Act of 1870 covering mechanical and design patents and copyrights did not explicitly define the rights and privileges of a patentee. However, this Court in *Blumer* v. *McQuewan,* 14 Howard (55 U.S.) 539, 549, 14 L. Ed. 532, said:

> "The franchise which the patent grants, consists altogether in the right to exclude everyone from making, using, or vending the thing patented without the permission of the patentee. This is all that he obtains by the patent."

In the same 1870 Act, the copyright privileges in Section 86 were specified as:

> "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending."

The rights granted under the design patent and copyright laws in force at present are identical with the rights specified above. The present copyright law grants sole rights (Section 1 (a) "To print, reprint, publish, copy and vend the copyrighted work" and (b), "to complete, execute and finish it if it be a model or design for a work of art."

The design patent and copyright sections of the 1870 Act both specified "statues." In the design patent portion, the "statute" protected was clearly an article of

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manufacture. The copyright "statue" to be protected was **a work of fine art.**

The difference in the grants under design patent and copyright laws must be due to the manufacturing rights. The word "copy" in the copyright section of the 1870 law and in the present copyright law cannot possibly mean to manufacture in quantity.

DIFFERENTIATION BETWEEN COPYRIGHT AND DESIGN PATENT MONOPOLIES ALONG MANUFACTURING LINES IS RATIONAL AND SOUND AND HAS A LEGAL BASIS.

This Court in *Fisher Music Co.* v. *Witmark,* 318 U.S. 643 (1943) has clearly shown that the basic roots of copyright law go back to early British law. The recent development of British law on the matter in issue is instructive.

In England, the Copyright Act, 1911, (Copinger and James on the Law of Copyright, 8th ed. pub. London, 1948, pp. 388-413) grants the sole right (Sec. 2) to "produce or reproduce." In Sec. 22 of this British Act (p. 402), the law provides that it shall not apply to designs which may be registered under the Patent and Design Acts "except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process."

It is thus apparent that the British differentiate works of art for copyright and for protection under the Design Patent Act on the basis of mechanical reproduction. In fact, by an order of the Board of Trade dated in 1932, (Copinger, p. 429) it was decreed that 50 single articles was the limit of reproduction under copyright.

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The copyright laws of the United States from 1870 up to date have not used the broad language of "produce" or "reproduce" but instead used "copy" in the grant. The use of this word "copy" is significant and explains why Sec. 22 of the British Act defining the line of demarcation between copyright and design patent along manufacturing lines was not considered to be necessary in the United States laws.

Up to 1948 (the year when the Copyright Office changed its policy on three dimensional works of art) the policy of the Copyright Office as indicated by its regulations in force for 40 years (Pet. Br. pp. 21-22) was to consider appropriate items submitted for registration as works of art, not articles of manufacture. The Copyright Office in its regulations from 1909 to 1948 specifically referred to the patent laws to put the public on notice that there was a line of demarcation between copyrights and design patents. In 1948 the Copyright Office changed its regulations in an attempt to obliterate the line of demarcation and omitted all reference to patent laws.

The Copyright Office prior to 1948 could not and did not attempt to guess what the intentions of a copyright registrant were. It simply took the word of each registrant that the item was a work of art as distinguished from an article of manufacture. Since 1948, the Copyright Office apparently does not care.

For example, the Copyright Office has photographs in its brief (App. C) to show a silver spoon, a letter opener, a magazine rack, a cabinet and a clock as being registered as works of fine art at the turn of the century. With renewals, the copyrights would still be in force. If the spoon, for example, were not mass produced, then it may be con-

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sidered as a work of art. But if the spoon were mass produced (and the Copyright Office does not have the facilities for determining this) then the reasoning of this Court in *Gorham* v. *White* (81 U.S. 511 (1871)) on the design of a spoon as an article of manufacture is ignored.

It is submitted that around 1904 and even now, such copyright registrations as cited above in the photographs do not support quantity manufacturing monopolies.

Since 1948, the policy of the Copyright Office, as indicated by the new regulation (202.8, Pet. Br. Chart opp. p. 46) and the Warner article (Pet. Br. Appendix) has been changed in a fundamental manner. The change in the policy is not simply a redefinition of what is a work of art or fine art. It is an assertion that the Copyright Office offers cafeteria service, quickly, simply and cheaply to manufacturers who will not, dare not, or cannot go to the Patent Office.

FUNDAMENTAL SHIFT IN POLICY OF A GOVERNMENT BUREAU CAN ONLY BE ACCOMPLISHED BY NEW LEGISLATION.

The lack of statutory authority to copyright articles of manufacture, as the statues and lamps in suit here, can not be cured by any juggling of regulations of the Copyright Office. If, as the trial judge below (Rec. p. 58) found, the new regulation 202.8 is the same as the old regulation 12 (g) (both in Pet. Br. opp. p. 46) then we submit that the copyright registrations in suit are invalid because of non-compliance with the regulation and statute. If the new regulation is broader and is supposed to justify the copyrights in suit, then the regulation must fall, together with the copyrights, as not being in compliance with the copyright law. The Copyright Office brief (pp.

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13-14) implying a concession by petitioner as to the registrability of lamps under the present copyright regulation 202.8 is therefore in error.

Both the respondents and the Copyright Office contend that the regulations of the Copyright Office in force from 1909 up to 1948 do not mean what they say but really define the extreme limits. All regulations define limits. In the case of *Steinmetz* v. *Allen,* 192 U.S. 543, this Court had occasion to consider one of the rules of practice of the United States Patent Office. On page 556, this Court pointed out

> "the Commissioner of Patents, exercising the power conferred, established, among other rules of practice, Rule 41. It thereby became a rule of procedure and constituted, in part, the powers of the primary Examiner and Commissioner. In other words, it became an authority to those officers, and, necessarily, an authority 'under the United States.' "

It is submitted that the rules and regulations of the Copyright Office existing from 1909 up to 1948 became an authority to the register of Copyrights "under the United States." The Register was just as much bound by those regulations as was the general public. If the 1948 regulation 202.8 is not simply a redefinition but rather a fundamental reorientation of copyright policy, then we submit it can only be accomplished by and under new statutes by Congress.

MONOPOLIES MUST BE CREATED BY LAW, NOT SYMPATHY.

The Respondents (Res. Br. pp. 27-29) imply that there is some inherent law of nature or justice that should protect a manufacturer of ornamental articles of manufacture

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against copying; that if the design patent laws can not be satisfied then the copyright laws should apply. Natural law and justice are just as strong in England as here. There the law explicitly states that copyright cannot be used as an instrument of subversion of the design patent requirements. In the United States and in England there is no rule of natural law or justice which functions as a substitute for a mechanical patent. If an inventor can not satisfy the novelty requirements, his discovery is in the public domain and can be copied by anyone.

If an industrial designer can not satisfy the novelty requirements of the design patent laws, then his design **AS USED ON ARTICLES OF MANUFACTURE** can be copied by anyone. We submit again that **a three dimensional artistic article of manufacture, such as the lamps or the statues here, can be protected only under design patent law.**

The respondents and Copyright Office refer to a copyright law enacted in 1883 in support of their contention that manufacturers of artistic articles of manufacture are protected by copyright. This particular law was passed by Congress in response to demands for an amelioration of the requirements of the 1870 law regarding the copyright notice. For the first time, the 1883 law permitted the required copyright notice to be placed on some inconspicuous part of the work of art, such as the bottom or back. This same law did mention "manufacturers." If Congress had any intention at all to provide manufacturing rights for three dimensional works of art, it would have retained "manufacturer" in connection with three dimensional works of art. Only "copy" in the 1870 act was retained in the 1909 copyright law. **The 1909**

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copyright law retained the copyright notice location feature of the repealed 1883 Act but discarded any reference to "manufacturers."

If the operation of design patent law works an injustice, fancied or real, then the remedy is up to Congress. Designs for dresses, methods of doing business are two fields where there is admittedly no protection. Congress has been importuned to remedy the dress design problem but Congress has refused. No one has successfully invoked natural law or justice to prevent style copying.

When the Patent Office refuses a patent on a design, it means that the design as far as articles of manufacture are concerned is in the public domain. Anyone can manufacture an article using such a design. A design in the public domain may be copyrighted—**BUT IF THE COPYRIGHT IS INTERPRETED TO MEAN MANUFACTURING RIGHTS then** what is the good of the holding that the design is in the public domain?

To validate the copyrights in suit for articles of manufacture on the ground that the Patent Office will not find patentable novelty in the "free forms" and other elements of art is to invite those rejected by the design division of the Patent Office, or those who feel that they will be rejected, to go to the Copyright Office. In other words, the Copyright Office would be encouraged to accept, for copyright, designs for articles of manufacture, which have been or would be held unpatentable and thus be in the public domain. If the copyright term were for several years or if there were safeguards to prevent subversion of design patent requirements, then there might be some sympathetic ground for the argument that respondents should have the benefit of some limited protection. But

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when the copyright monopoly is created solely by the claimant, for a possible 56 years, with the drastic penalty provisions, then the instinct of self protection on the part of the public dictates rigid compliance with the law and no resolutions of doubts tending to subvert the design patent laws.

ARTISTIC ARTICLES OF MANUFACTURE SUCH AS HERE COPYRIGHTED HAVE LONG BEEN PROTECTED BY THE PATENT OFFICE.

The respondents and Copyright Office suggest that the Patent Office has and still does confine its field to non-artistic articles of manufacture, that the articles of manufacture contemplated by the design patent laws are not works of art, do not have "standard art form" or "free forms" or true sculpture. As the petitioners' book of exhibits of design patents shows, the Patent Office has and still does grant patents having the above artistic attributes. There are many examples of sculpture and other highly artistic articles of manufacture ranging from purely ornamental (figures and statues) to combined ornamental and utilitarian (lamp bases, clocks, book ends, plates).

Both the respondents and Copyright Office have relied heavily on *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239 (1903). This case shows that a copyrighted painting may be used for commercial purposes.

Petitioners are not arguing for a restriction of the nature of the use of a copyrighted item but are arguing against the abuse of the copyright monopoly in expanding "copy" of a work of art to mean mass produce an article of manufacture. It should be observed that painting is not an article of manufacture so that the present design patent law would have no bearing upon present copyright law as applied to painting.

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The real lesson of this case lies in the setting off of work of art against an article of manufacture. As Justice Holmes stated in that case (p. 251)

> "The antithesis to 'illustrations, or works connected with the fine arts' is not works of little merit or of humble degree, or illustrations addressed to the less educated classes; it is 'prints or labels designed to be used for any other articles of manufacture.' "

Paraphrasing the above, the antithesis to works of art or works of fine art is articles of manufacture.

As the respondents suggest, there is no reason why an artist or artistic person should not make money like anybody else. On the other hand, we respectfully suggest that simply because a person has artistic talent is no reason for considering such person other than an industrial designer and making it easier for such a person to make money. When an artist becomes a manufacturer or a designer for a manufacturer he is subject to the limitations of design patents and deserves no more consideration than any other manufacturer or designer.

RESPONDENTS' ALLEGED COPYRIGHTS INVALID AB INITIO.

The Copyright Office brief alleges that petitioners concede the validity of respondents' copyrights but argue misuse or non-infringement. Independently of the existence of the Design Patent Laws, respondents' alleged copyrights were destroyed by selling one thing and registering something else. In addition, the existence of the design patent laws negatives any compliance with the copyright law on the part of respondents.

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We submit that a three dimensional product which is created by a manufacturer for practical utility and manufactured by mechanical means in mass production is neither a work of fine art nor a work of art as contemplated by the copyright law. Such manufacturer who sells or publicly distributes the manufactured product under copyright notice and who registers his alleged copyright by sending such manufactured product to the Copyright Office is not copyrighting a work of art but is attempting to copyright an article of manufacture and establish a monopoly, which if it can be established at all can only be effected by way of the design patent laws.

Again it should be observed that, unlike the patent monopoly which is brought into being by the Patent Office, the copyright monopoly is self created by publication or sale with notice, the duration being for 28 years with a possible renewal for another 28 years. The registration of the monopoly in the Copyright Office is a mere formality which the copyright proprietor can perform at any time convenient to him. The only requirement is that the registration be effected before suit on the copyright. The Copyright Office concedes this (Br. p. 39).

It is clear from the above that no statutory copyright ever came into being and the alleged copyrights in suit were and are invalid from the very beginning.

THE EXPERT CASE.

Respondents (Br. pp. 29-30) discuss the *Stein* v. *Expert* case in the District Court and Court of Appeals for the 7th Circuit. Respondents have seized upon some supposed differences over other Stein lawsuits to indulge in a hypothesis that but for such differences the District Court and

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Court of Appeals in the 7th Circuit would have reached a different conclusion. Upon petition by Stein for reconsideration in the District Court in Chicago, the District Court in Chicago disposed of these differences as immaterial and denied the petition. (Def. Pet. physical ex. 1) The Court of Appeals for the 7th Circuit affirmed. The respondents in the Court of Appeals below expressly stated (page 32 of brief before Court of Appeals 4th Circuit)

> "*Stein* v. *Expert Lamp Co.* was similar to the present case."

The trial Court below reviewed the Expert case both in the District Court of Chicago and the Court of Appeals for the 7th Circuit and found the Expert case facts similar to the facts in the case at bar. The Court of Appeals below was unable to find any difference over the Expert case and was constrained to register its disagreement.

CONCLUSION.

For the reasons given, therefore, it is respectfully submitted that the judgment of the Court below be reversed and the prayer of petitioners as set forth in the brief be granted.

Respectfully submitted,

MAX R. KRAUS,
ROBERT L. KAHN,
Counsel for Petitioners.

Dated November 28, 1953.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 228

EMANUEL MAZER AND WILLIAM ENDICTER, d/b/a JUNE LAMP MANUFACTURING COMPANY,

Petitioners,

VS.

BENJAMIN STEIN AND RENA STEIN, d/b/a REGLOR OF CALIFORNIA,

Respondents.

Reply Brief for Respondents

WILL FREEMAN,
GEORGE E. FROST,
135 S. LaSalle St.,
Chicago 3, Illinois

CHARLES F. BARBER
701 Union Trust Bldg.,
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondents.

Reply Brief for Respondents

We are moved to file this brief to reply to the new point raised in Petitioners' reply brief that "the present copyright law cannot possibly mean to manufacture in quantity" (p. 3). The fact is that Congress framed the Copyright Code specifically to cover works manufactured in quantity. Section 12 of the Code (Title 17, U.S. Code) is entitled "Works Not Reproduced for Sale". With respect to works of art, this Section permits registration upon the basis "of a photograph or other identifying reproduction thereof". Section 13 of the Code—"Deposit of Copies After Publication"—provides that "two complete copies" must be deposited to support the registration where there

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has been publication. Surely, when Congress has expressly distinguished between "Works Not Reproduced for Sale" and other works—and provided registration procedures for both—it cannot be said that the law is confined to works not manufactured in quantity.

Other provisions of the Copyright Code likewise specifically refer to "copies" in the plural, *e.g.* Section 10 (notice to be placed on "each copy"); Section 19 (notice on "copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title").

Petitioners' contentions that copyright does not cover a work reproduced in quantity are not raised in the answer, were not considered by either court below, and are not mentioned in the petition herein.

We respectfully submit that the judgment below should be affirmed.

WILL FREEMAN,
GEORGE E. FROST,
135 S. LaSalle St.,
Chicago 3, Illinois

CHARLES F. BARBER
701 Union Trust Bldg.,
Washington 5, D. C.

December 1, 1953.

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APPENDIX

1. Title 17, United States Code (Copyrights):

§ 12. Works Not Reproduced for Sale.—Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work * * * ; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. * * *

2. Title 17, United States Code (Copyrights):

§ 13. Deposit of Copies After Publication; Action or Proceeding for Infringement.—After copyright has been secured by publication of the work with notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the copyright office * * * , two complete copies of the best edition thereof then published * * * ; or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section 12 of this title * * *."

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Petitioners,

VS.

BENJAMIN STEIN AND RENA STEIN, doing business as Reglor of California,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

Petition for Rehearing

ROBERT L. KAHN,
105 W. Adams St.,
Chicago, Ill.

MAX R. KRAUS,
33 N. LaSalle St.,
Chicago, Ill.

Counsel for Petitioners.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioners respectfully pray that this Court grant a rehearing of its Judgment and Opinion of March 8, 1954 on the ground that in the words of the separate Opinion of Justices Douglas and Black "An important constitutional question underlies this case—a question which was stirred

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on oral argument but not treated in the briefs." The principal Opinion (pages 5 to 7 inclusive) does not provide an answer to the constitutional question raised for general guidance.

The separate Opinion in the last paragraph points out "The interests involved in the category of 'works of art,' as used in the copyright law, are considerable. The Copyright Office has supplied us with a long list of such articles which have been copyrighted—statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays." In addition to the above, the Copyright Office also included examples of silverware and furniture (Copyright Office Brief, p. 70, 78). It is respectfully suggested that the future course of these considerable business interests will be seriously hampered by the doubt of constitutionality expressed in the separate Opinion. Lower courts would not venture to hold the Copyright Code unconstitutional as regards statuettes in view of the Opinion of this Court.

In the Petitioners' reply brief, page 10, we specifically denied that the copyrights in issue here were valid. The reasons given by the Petitioners for such invalidity are no longer tenable in view of the Opinion of this Court. However, the separate Opinion has substituted other and more fundamental reasons based upon the Constitution. It is respectfully submitted, therefore, that the question of validity of the copyrights in issue, which validity was denied by the Petitioners, is still open for a decision by this Court.

The Opinion of this Court on page 5 accepted the accuracy of the first paragraph of the question presented by Pe-

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titioners.[1] The question propounded in the separate Opinion and implicit in the original question has been reduced to the lowest possible denominator—Can statuettes of dancing figures be copyrighted under the United States constitutional provision—"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," Art. 1, & 8, cl. 8?

The question raised in the separate opinion is not simply as to whether a statuette may be copyrighted under the provisions of the United States Constitution but whether copyright of such items as statuettes is not forbidden by the Constitution.

The constitutional basis for the copyright law resides in the constitutional clause given above. For the issue raised by the separate Opinion, the above constitutional provision may be reduced to "To promote the progress of science * * *, by securing for limited times to authors * * * the exclusive right to their * * * writings * * *." The separate Opinion asks—Are statuettes (and other items enumerated in the last paragraph of the Opinion) "writings of an author" within the meaning of the Constitution?

The history of laws to protect intellectual property shows that statues and three dimensional objects of art had been classified prior to 1870 with patents for inventions.

The foundation of modern patent law is generally credited to the enactment in 1623 by Parliament in England of

[1]"Can statuettes be protected in the United States by copyright when the copyright applicant intended primarily to use the statuettes in the form of lamp bases to be made and sold in quantity and carried the intentions into effect?"

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the celebrated Statute of Monopolies (21 Jac. 1 ch. 3—Walker on Patents, Deller's ed. 1937, page 18). This abolished all monopolies and forbade the Crown to grant any monopolies in the future except as defined by Section 6 thereof. This Section 6 provided for the grants of Letters Patent for 14 years, or under, to the first inventor or inventors of new manufactures.

The first copyright statute is the famous Act of 8 Anne, c. 19, entitled "An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned." (Curtis on Copyrights, 1847, appendix page 1). This Act of 1710 pertained to books and "other writings" and did not cover sculpture, statues or three dimensional works of art. Statutory copyright protection in England was extended to prints in 1735 (8 George II c. 13—Curtis on Copyrights, 1847, Appendix p. 8). No statutory copyright protection was obtainable in England on sculpture or statuary until 1798, after the Constitution of the United States had been adopted. Thus prior to the adoption of the Constitution, "writings of an author" had a definite and well-established meaning in copyrights.

After the Colonies had gained their independence from England but prior to the adoption of the Constitution of the United States, twelve of the thirteen original states (Delaware was the exception) had copyright statutes limited to actual physical writings in the literal sense of the term. For convenience, a tabulation is herewith given.

CONNECTICUT—1783 entitled
"An Act for the encouragement of literature and genius".
Protected; Books; Pamphlets, Maps and Charts.

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MASSACHUSETTS—1783 entitled

"An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions for 21 years."

Protected; Books and Treatises.

MARYLAND—1783 entitled

"An Act respecting literary property".

Protected; Books and Writings.

NEW JERSEY—1783 entitled

"An Act for the promotion and encouragement of literature"

Protected; Books and Pamphlets.

NEW HAMPSHIRE—1783 entitled

"An Act for the encouragement of literature and genius, and for securing to authors the exclusive right and benefit of publishing their literary productions for 20 years".

Protected; Books and Treatises.

RHODE ISLAND—1783 entitled

"An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions for 20 years".

Protected; Books, Treatises and other Literary Productions.

PENNSYLVANIA—1784 entitled

"An Act for the encouragement and promotion of Learning by vesting a right to the copies of printed books in the authors or purchasers of such copies, during the time therein mentioned".

Protected; Books and Pamphlets.

SOUTH CAROLINA—1784 entitled

"An Act for the encouragement of arts and sciences".

Protected; Books and Pamphlets.

VIRGINIA—1785 entitled

"An Act securing to the authors of literary works an exclusive property right therein for a limited time".

Protected; Books and Pamphlets.

NORTH CAROLINA—1785 entitled

"An Act for securing literary property".

Protected; Books, Maps and Charts.

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GEORGIA—1786 entitled
"An Act for the encouragement of literature and genius".
Protected; Books and Pamphlets.

NEW YORK—1786 entitled
"An Act to promote literature".
Protected; Books and Pamphlets.

DELAWARE—Had no Copyright Law.

Some of the original states also had patent acts (Walker on Patents, Deller's ed. 1937 pages 28-32).

At the time the United States Constitution was adopted, the wording of the constitutional clause laying the basis for patent and copyright protection was provided with the background of copyright protection restricted to literary works only. This was in spite of the ancient art of sculpture and well-known methods of making copies. (20 Encylopaedia Brittanica (1948) p. 229; *Jungerson* v. *Ostby & Barton Co.* 335 U. S. 560) The constitutional language of "writings of an author" instead of the more comprehensive term "works of an author" or "products of an author" was thus deliberate and intended to exclude three dimensional works as sculpture and statues from the scope of copyright protection. It might be observed that photography was not known at that time.

It is significant that the constitutional clause considered here does not use "authors" alone. The definition contended for by the Copyright Office in its brief (page 10) would be broad enough to include "inventing" and thus render the word "inventors" in the constitutional clause unnecessary. By well-accepted rules of interpretation, the definitions of "authors" and "inventors" must be mutually exclusive. On that basis, "inventors" would cover three dimensional art

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works such as sculpture and statuary while "authors" would be restricted to literary matters. The fact that "writings" is associated with "authors" adds weight to this interpretation.

The framers of the Constitution must have considered anyone who made a sculpture or statue as being an inventor who could obtain protection under patent statutes to be enacted. This view is borne out by the fact that the first Copyright Act of 1790 (1 Stat. 124) was limited to books, maps and charts and that no protection for sculpture and statues was possible until the enactment of the first Design Patent Act of 1842 (5 Stat. 543, Walker on Patents, p. 558). The inclusion of sculpture and statues as subject matter exclusively for design patents and not for copyright was maintained until 1870. In the 1870 Act, copyrights and design patent laws were consolidated. (16 Stat. 198, 212). For the first time in the history of the United States, statues were made the subject of copyright registration while still retaining their position as subject for design patent protection. The inclusion of statues as subject for design patent protection still exists, as Petitioners' booklet of Design Patents referred to in the Opinion indicates.

The question that the separate Opinion raises is whether the inclusion of statues in the field of copyright protection provided by the Act of 1870 was justified by the expression "writings of an author" derived from the Constitution. Historically, up to 1870, the inclusion of statues and statuettes as subject matter for copyright registration was not justified by the United States Constitution.

The line of demarcation between copyright and patents was further emphasized by the fact that in the same year

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that the first Copyright Act was enacted (1790), the Patent Act of 1790 was enacted (1 Stat. at Large 109). This Patent Act is entitled "An Act to promote the Progress of **Useful Arts.**" This Act covered inventions or discoveries of a **useful art,** manufacture, and the like. (The above and later early patent statutes are found in Walker on Patents, Deller's ed. 1937 beginning with page 514.)

The patent protection was elaborated upon in the Patent Act of 1793 (1 Stat. at Large 318), the Act being entitled "An Act to promote the Progress of **Useful Arts;** and to repeal the Act heretofore made for that purpose." This Act related to inventions for any new and **useful art** and the like.

All of the subsequent Patent Acts, including the Design Patents, have purported to promote the progress of "useful arts." As as example, the first Design Patent Act of 1842 was entitled "An Act . . . to promote the progress of the **Useful Arts** . . . " (5 Stat. 543). The expression "**useful arts**" as used in the Constitution has always been found in patent enactments, whether for mechanical or for design patents. Obviously, sculpture and statuary come under "useful arts" and traditionally are included in the field of patent coverage only and not considered "writings of an author." Up to 1870, all "writings of an author" had never referred to any three dimensional work such as a statue.

The fact that this Court has not had to pass upon this question prior to the case at bar is due to the penal provisions of the copyright law rather than any positive acquiescence or recognition of the constitutionality of the inclusion of statues in the copyright law. If the copyright term of 28 years for a statue had been made the same as the term of a

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design patent, then the inclusion of statues as subjects for copyright or design patent protection might be considered moot in view of the Opinion of this Court. However, the inclusion of statues in "writings of an author" fundamentally affects rights of the public. Hence the constitutional classification is of the utmost importance.

In this connection, it should be noted that "reproduction of works of art" in the copyright law, referred to in the Opinion p. 4, is a subject classification (e.g. photographs being reproductions of a picture or of a statue as a work of art) where a separate and distinct artistry from the original artistry present in the work of art is involved (see Reg. 13h of Copyright Office in force 1909-1949—Petitioners' Br., chart opposite p. 46)

"Reproduction of a work of art" obviously does not mean the manufactured product, as indefinite copyright under copyright classification (h) "Reproductions of a work of art" (Petitioners' Brief, chart opposite p. 46) would then be implied. Even the Copyright Office has not contended that "reproduction of a work of art" relates in any way to production, limited or not. (Copyright Office Brief, p. 19, 21). The language of the Opinion on page 5:

> "The constitutional power of Congress to confer copyright protection on works of art or their reproduction is not questioned."

is believed to be a misapprehension of Petitioners' position, if "reproduction" means the same as in the sentence:

> "'Reproduction of a work of art' does not mean to them unlimited reproduction."

on page 4 of the Opinion. This expression, "reproduction of a work of art," does not bridge the gap between copyrights and design patents as provided by the Constitution.

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CONCLUSION.

It is therefore respectfully prayed that the Petitioners be granted the opportunity to be reheard.

Respectfully submitted,

Robert L. Kahn,
Max R. Kraus,
Counsel for Petitioners.

Chicago, Ill.
March 18, 1954.

CERTIFICATE OF COUNSEL.

The undersigned hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds above specified.

Robert L. Kahn,

Max R. Kraus.

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